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# Heads of State Travelling the World Carrying a Heavy Baggage

- Heads of State, Immunity and  
International Crimes – Can Immunity Be  
Lifted?

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# Summary

The purpose of this thesis is to investigate whether a new rule of customary international law has evolved that allows for an exception to the Head of State immunity regarding the perpetration of international crimes. In the legal literature and in codification attempts the view has been expressed that this new rule already exists. This thesis investigates whether this is a correct interpretation of the law as it stands today.

The judgment in the *Yerodia* case did not receive a very warm reception from the world community. The reason for this is that the court established an absolute immunity for Ministers for Foreign Affairs in office. The court also gave its opinion on the immunity for former Ministers of Foreign Affairs. Here, the court asserted that the immunity would prevail for all acts taken by the Minister while in office that is of an official character. Some legal writers have been opposed to the judgment because they maintain that the court erred in its decision when it accorded immunity to former Ministers for Foreign Affairs accused of international crimes. According to these critics, the court should instead have acknowledged a new customary international law rule that allows for the exception to immunity for international crimes.

In my opinion, it is essential to separate the practise of international tribunals from that of national courts. The reason for this is that in front of international tribunals, States have explicitly limited the immunity for its individuals by either ratifying a treaty establishing the statute of the tribunal or as a member State of the UN. The same waiver of immunity has not been made concerning citizens in front of foreign national courts. In my thesis, I find that no immunity can be enjoyed in front of international tribunals. The whole purpose of these international tribunals has been to prosecute the persons responsible of international crimes. The practise from national courts offers a more diverse picture. In my investigation of international case law, I examine eight national court decisions and only two of these decisions provide for the removing of the Head of State immunity regarding international crimes. Moreover, none of those two cases contain any evidence of a belief (*opino juris*) that an exception to the immunity for Heads of State committing international crimes have developed. As a conclusion, I find that the practise from national courts cannot be used as evidence of a rule in customary international law that allows for the exception to immunity for international crimes.

Some voices in the international legal literature that claim the existence of a new customary law rule put forward arguments of a moral nature, meaning that they are based on a sense of justice rather than law. However good and valid these arguments are, the most important factor for a successful prosecution of a foreign Head of State is the foreign State's will to go forward with a prosecution. Without this political will, no prosecution can

take place. In the thesis, I conclude that none of the arguments presented in the legal literature provide for a limitation of the Head of State immunity regarding international crimes.

The ICJ proclaims in the *Yerodia* case that former Ministers for Foreign Affairs can be tried for all acts of a private capacity taken while in office. This argument opens up for the possibility to prosecute those responsible of international crimes, assuming that these crimes can be said to have been committed in a private capacity. Such a solution to the problem has been put forward by some national courts. There are however, considerable obstacles to regarding international crimes as crimes committed in a private capacity. For instance, certain crimes, such as crimes against the humanity and torture contain an official element and here it seems to be of no use to deny the official nature of the act. In the thesis, I find that it is impossible to regard international crimes as crimes committed in a private capacity.

International crimes are the most horrendous crimes thinkable and therefore it is important to prosecute the persons responsible of these crimes. The evolvement of a new rule allowing for an exception to the Head of State immunity is not here yet but I hope that the future will bring a better balance between State sovereignty and the need to prosecute those responsible of international crimes.

# Preface

I would like to thank everyone who has encouraged and helped me in the process of writing this thesis. Special thanks go to those people who entertained me during the coffee breaks at Juridicum.

# Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
GA	United Nations General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
NGO	Non-Governmental Organization
SC	United Nations Security Council
UK	United Kingdom
UN	United Nations
US	United States of America

# 1 Introduction

## 1.1 Subject and Purpose

Atrocities are unfortunately part of our past and it is doubtless that they will form part of our future as well. International crimes such as genocide, torture and crimes against the humanity are regrettably common features in many of the conflicts around the world. An interest shared by the world is to hold the authors of such horrible crimes responsible for their actions. One way to acquire some sort of justice is to bring the perpetrators of international crimes to court. Such trials can be held in some of the world's international tribunals or by the national courts. The individual immunity enjoyed by Senior State Officials travelling in foreign countries can present a bar to criminal prosecution in these countries. Non-Governmental Organizations and human rights activists constantly struggle in their fight against impunity and take efforts to bring those responsible of atrocities to justice. The need to prosecute the persons responsible for international crimes and at the same time uphold State sovereignty is a problematic question currently discussed within international law of today. Recent decisions from courts such as the House of Lords in the United Kingdom, the International Court of Justice and the French Cour de Cassation have all highlighted these issues. The International Criminal Tribunals in Rwanda and Yugoslavia and the newly established International Criminal Court also raise questions concerning international criminal law and the limits it should have. What immunity high ranked officials such as incumbent and former Heads of State and Government and Foreign Ministers should enjoy is an issue that frequently is discussed with different results. Individual immunity for State Officials engages a finding of the balance between State sovereignty, on one hand and the need to prosecute and punish severe criminals, on the other hand. This balance has to be borne in mind when discussing the rules on immunity. In the end, it all comes down to the will of States to contribute to the fight against impunity and the interest they have in prosecuting perpetrators of international crimes.

The main rule that I am working with as an outset is the notion that Heads of States enjoy a complete immunity, even after having left office, for all acts taken in an official capacity. It has been suggested in codification attempts that an exception to this Head of State immunity comes into being concerning international crimes. The codification attempts aim at being guidelines for States and contain the conclusions drawn from State practise. My investigation of the international case law in the thesis will establish whether the drawn conclusions in these attempts were correct. I have chosen to use the *Yerodia* case as a starting point for my thesis. The reason for this is that I believe that the judgment and the critique it has attracted very well reflects the contrasting views in today's international law when it comes to personal immunities for Heads of State and the question if there should be any exceptions to this immunity for international crimes.



The purpose of the thesis is to answer the following question;

*Has a new rule in customary international law been established that allows for an exception to the Head of State immunity regarding the perpetration of international crimes?*

In order for me to answer this question, I will examine the concept of immunity from criminal jurisdiction for these individuals in regard to international crimes and investigate how immunity has been applied in international and national courts. Going through the legal literature on the subject matter, I have come to realize that many writers tend to have an emotional view on the possible exception to immunity for international crimes. Many of the arguments that I have come across are of a moral character. The notion that international crimes are so heinous that the perpetrators of these crimes should be punished no matter what the law says is a common argument. I think it is very important to remember that we are talking about rules of law. It is true that customary international law is a dynamic area that evolves. It is important however, to remember that the persons who claim the evolvment of a new rule also need to show evidence of this. The burden of proof must lie on the part that claims something novel. This thesis is discussing jurisdictional immunity for international crimes, being the most horrible crimes thinkable. Prosecuting the persons responsible of such crimes is of course an important moral act. The fact that the removal of immunity for these crimes makes a good argument from a human rights perspective does not bring a new rule of law into being. The Advocate General in the *Gaddafi* case expressed this well when he said, "I cannot sufficiently underline that the exclusive responsibility of the Court of Cassation is to state the law and only the law, without taking account of subjective or humanitarian considerations, however worthy they might be."<sup>1</sup>

## 1.2 Method and Material

I am using a method in the thesis that is in part descriptive, in part analytical. By conducting an investigation *de lege lata*, through the jurisprudence of international tribunals and national courts, I have been trying to crystallize the *opinio juris* of the international community. A very brief survey of the practise from international tribunals has been made, and the focus lies instead on judgments from national courts. The material I have reviewed is mainly case law, legal literature in the form of books and articles as well as information available on international websites. Since the doctrinal debate on individual immunity for Heads of State provides very divergent views, only the recurrent viewpoints have been included in this study.

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<sup>1</sup> Advocate General in Gaddafi Case *supra* note 101, p. 508.

## 1.3 Delimitations

The different areas of public international law are intertwined and correlate with each other in ways that makes it impossible to treat one area as isolated from other areas of international law. It is however, necessary when writing a master thesis in public international law to make limitations and narrow the subject down. I have tried to concentrate on my main subject and leave out all other, however relevant, areas. Throughout this thesis, I will be using the words “Head of State immunity”. As explained below in section 3.3, I, with this, intend to incorporate the immunity accorded to Heads of Government and Foreign Ministers. The main reason for why I have added also these Officials to the group of Heads of State, is that I believe the immunity accorded to all of the mentioned Officials is the same, even though they might have different bases for the immunity. A precondition for immunity to be at hand is that jurisdiction can be established, and therefore discussions on this subject and the current debate on universal jurisdiction are relevant. This thesis, however, will not go into the subject of universal jurisdiction, but focuses on questions concerning immunity as such. This study will therefore presume that jurisdiction can be established. The immunity discussed in this thesis is the immunity from criminal jurisdiction, I am deliberately leaving out questions concerning civil jurisdiction. Furthermore, I have chosen not to deal with the issues of individual criminal responsibility.

In this thesis, I have chosen to separate the international jurisdictions from national jurisdictions because I consider the difference between the two jurisdictions immense.<sup>2</sup> This difference arises because the international tribunals and national courts establish their jurisdictional base differently. This difference makes it impossible for me to treat the practise from the two jurisdictions in the same way. It is also for this reason that I have chosen to focus on the practise from national courts, the practise from international tribunals are touched upon very briefly. Practise from the Special Court for Sierra Leone is deliberately neglected because this tribunal has a mixed international and national character and therefore does not fit in the purpose of my thesis. A State always has the possibility of waiving the immunity for its citizens who are facing proceedings in a foreign court, this is however not a very common phenomenon and this thesis will presume that the State does not intend to do that. I will be altering between the words immunity *ratione personae* and procedural immunity, and the same goes for immunity *ratione materiae* and substantive immunity. When I use the word, “he” it is intended to incorporate “she” as well.

Throughout this thesis, I will be using the phrase “international crimes”. With this, I mean crimes of a certain dignity defined in international conventions and linked to the principle of universal jurisdiction. Cassese describes international crimes as, “[t]hose international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values, or

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<sup>2</sup> See section 4.

which is the product of state action or a state-favouring policy.”<sup>3</sup> Crimes like torture, crimes against the humanity, war crimes and genocide are all examples of international crimes. Finding the relevant case law for this thesis has not been a very easy task. Obviously, not too many cases can be found that concern a Head of State charged with international crimes in front of a foreign court. Even fewer of the cases that I have found deal with former Heads of State. The judgments discussed in this thesis were selected because they have been used by writers of the legal literature as evidence of a new customary law rule. Language barriers have made it impossible for me to read some judgments from national courts. In these instances, I have had to rely on official and un-official translations found in the legal literature.

## **1.4 Codification Attempts**

Because of the uncertain state of law in this area, and the fact that there are different opinions enshrined in the doctrine, a clarification is highly desirable. Some attempts in the past have been made to draw up guidelines for States and prepare drafts for future codification. The International Law Commission, jurists from around the world together in the Princeton Principles and the Institut de droit International have all recently come up with some suggestions.

### **1.4.1 ILC Draft Code of Crimes against the Peace and Security of Mankind**

In 1996, the ILC presented a Draft Code of Crimes against the Peace and Security of Mankind.<sup>4</sup> The Code is intended to apply to both international and national criminal courts.<sup>5</sup> Article 7 of the Code states:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as a head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

The Commentary to the Draft Code elucidate that article 7 was intended to prevent an individual who has committed a crime against the peace and security of mankind to hide behind a claim of immunity. The Commentary then goes further and says, “[t]he absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence.” It is not obvious what this sentence means. The next sentence does

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<sup>3</sup> Bassiouni p. 121.

<sup>4</sup> Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1996, vol. II, part two, p. 15.

<sup>5</sup> *Ibid.* article 8 on the establishment of jurisdiction.

give some further guidance, “[i]t would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.”<sup>6</sup> If this is interpreted as meaning that the procedural immunity should be limited the same way as substantive immunity, an adoption of the Draft would mean that national courts were to disregard both substantive and procedural immunity, at least with regard to the crimes covered by the Code. The Draft Code of Crimes against the Peace and Security of Mankind is still, as its name reveals, just a draft and as such not legally binding. Of course, it is feasible for ILC drafts to generate customary international law. The GA established the International Law Commission in 1947 to, “...promote the progressive development of international law and its codification.”<sup>7</sup> For years, the ILC has been developing international law through the interpretation of existing rules or through the formulation of new rules.<sup>8</sup> The members of the ILC (thirty-four international lawyers) are supposed to represent the principal legal systems of the world.<sup>9</sup> Of course, when a powerful organ such as the ILC produces a Draft, it does not pass unnoticed. Evidence of this is the GA Resolution 51/160 from 1996 where the GA expresses its appreciation of the ILC for completing its Draft Code.<sup>10</sup> The Draft Code of Crimes has, however, been heavily criticized and therefore its future as a powerful legally binding document is somewhat uncertain.

## 1.4.2 Princeton Principles on Universal Jurisdiction

The Princeton Principles on Universal Jurisdiction were formulated in 2001 by jurists from around the world to “...help clarify and bring order to an increasingly important area of international criminal law.”<sup>11</sup> The Principles promote universal jurisdiction with regard to certain serious crimes under international law. Among the more difficult questions discussed on the Project was the enforcement of universal jurisdiction and the question if immunities and amnesties should be given recognition with respect to the commission of serious crimes under international law. Principle 5 deals with the non-relevance of official position and reads:

With respect to serious crimes under international law as specified in Principle 2 (1), the official position of any accused person, whether as head of state or government or as a

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<sup>6</sup> International Law Commission Report, 1996, Chapter II, Commentary to the Draft Code of Crimes against the Peace and Security of Mankind, available at <http://www.un.org/law/ilc/reports/1996/chap02.htm>. Last accessed 13 May 2005.

<sup>7</sup> Introduction to the work of the International Law Commission, available at <http://www.un.org/law/ilc/introfra.htm>. Last accessed 13 May 2005.

<sup>8</sup> *Ibid.*

<sup>9</sup> Malanczuk p. 61.

<sup>10</sup> A/RES/51/160, 16 December 1996, para. 2.

<sup>11</sup> Princeton Principles on Universal Jurisdiction, available at <http://www.princeton.edu/~lapa/>. Last accessed 13 May 2005. See preface to the Principles.

responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 5 thus rejects the substantive immunity but says nothing of the procedural immunity. The Commentary to these Principles however, proclaims that “[u]nder international law as it exists, sitting Heads of State, accredited diplomats, and other state officials cannot be prosecuted while in office for acts committed in their official capacities.”<sup>12</sup> The Commentary carries with it some ambiguity for instance, where it states, “[t]he Principles do not purport to revoke the protections afforded by procedural immunity, but neither do they affirm procedural immunity as a matter of principle.” As a conclusion, the Princeton principles limit the substantive immunity regarding international crimes in front of national courts but argue in favour of leaving the procedural immunity intact. The Princeton Principles cannot claim however, to have any legally binding force, but they can be seen as evidence of the will of jurists around the world not to limit the procedural immunity in order to keep the smooth functioning of relations between States.

### **1.4.3 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law**

In 2001, the Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law was adopted by the Institut de droit International.<sup>13</sup> The reasons for preparing this Resolution were first to facilitate international communication between Governments and provide for the necessary special treatment for the exercise of the functions and fulfilment of the responsibilities of a Head of State, and secondly to restrict such immunities in order to put the Head of State at the same level as a private person regarding private law.<sup>14</sup> The first part of the Resolution deals with serving Heads of State. Article 1 affirms that the person of the Head of State is inviolable when in the territory of another State. Article 2 relates to criminal matters in foreign territory and establishes that:

In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.

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<sup>12</sup> Commentary on the Princeton Principles, annexed to the Princeton Principles on Universal Jurisdiction *supra* note 11, p. 49.

<sup>13</sup> Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, available in English translation at [http://www.idi-ijil.org/idiE/resolutionsE/2001\\_van\\_02\\_en.PDF](http://www.idi-ijil.org/idiE/resolutionsE/2001_van_02_en.PDF). Last accessed 13 May 2005.

<sup>14</sup> Fox p. 119.

The Resolution thus accords absolute procedural immunity from criminal jurisdiction to serving Heads of State for their period of office. Worth mentioning is that article 11 (3) makes it clear that nothing in the Resolution entails that a Head of State enjoys immunity in front of an international tribunal. The second part of the Resolution deals with former Heads of State. Article 13 (1) denies inviolability to former Heads of State in the territory of a foreign State. Article 13 (2) states:

2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.

The first draft of the Resolution recognized immunity *ratione materiae* for former Heads of State for all acts performed in the exercise of official functions. Apparently, it was the decision in the *Pinochet* case, where the law lords denied the immunity for Pinochet that required the insertion of an exception to the immunity *ratione materiae* rule in the case of the commission of international crimes.<sup>15</sup> The second sentence of the article leaves it open whether international crimes have to be performed in an official capacity or not. This was deliberately worded undetermined in order to get around the issue of whether a killing or torture committed for State purposes can be an act performed as official functions.<sup>16</sup> The removal of immunity for a former Head of State when he has committed an international crime in the course of official functions is, according to Fox, unsure, but in line with the controversial *Pinochet* case.<sup>17</sup> (This, of course, depends on how you choose to look upon the *Pinochet* case).

#### 1.4.4 The Implication of the Texts

Common to the above Principles, Draft and Resolution is the notion that immunity *ratione materiae* can be limited, regarding international crimes, in front of national jurisdictions. Since this is a rather progressive view, one could ask what relevance these Principles, this Draft and Resolution have as representing modern international law. Fox claims, concerning the Resolution and the above quoted provisions, that they obviously are "...novel *de lege ferenda* provisions".<sup>18</sup> Strictly speaking, they are all non-legally binding documents. Of course, there is always the possibility that these texts will stimulate State practise and even possibly turn into customary international law, and as such, become legally binding provisions. The value of the International Law Commissions statements can however not be underestimated. Taken together, the Principles, Draft and Resolution represent a powerful addition to the debate on personal immunities for Heads of State. The delicate issue at hand is whether these

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<sup>15</sup> *Ibid.* p. 121.

<sup>16</sup> *Ibid.*

<sup>17</sup> Fox p. 125.

<sup>18</sup> *Ibid.* p. 124.

texts represent the correct interpretation of State practise and therefore reflect the current state of customary international law or if they should be regarded *de lege ferenda* provisions.

# 2 The Yerodia Case

## 2.1 Introduction

In February 2002, the International Court of Justice had the opportunity to deliver a landmark ruling and decide the question of what limits immunity for high State Officials should have. In this case, the ICJ had to consider what immunities were available in international law to incumbent Ministers for Foreign Affairs charged with international crimes. The court gave its ruling on this issue and another when it, in a valuable *obiter dictum*, added its opinion on the immunity question in total. Commentators on the case such as the Amnesty International have put forward the objection that the *Yerodia* case can have no influence on criminal investigations in other States.<sup>19</sup> It is true that, according to article 59 of the ICJ Statute, a decision of the court has no binding force except between the parties and in respect of that particular case.<sup>20</sup> It is obvious though, that the judgment has, and will continue to have, a huge impact as the leading case on immunities for high State Officials. Moreover, there is no doubt that the case will have an effect on the way States deal with the issue on immunities. A proof of the judgment's impact on contemporary public international law is the fact that many legal scholars and writers have felt the need to criticize the court's ruling and comment on where and how the ICJ went wrong. The subsequent practise from national courts relying on this judgment will also be proof of the judgment's impact on international law. Some writers claim that the ICJ in just one ruling have taken the law on personal immunities several years back in time.

## 2.2 The Case in front of the ICJ

On 17 October 2000, the Democratic Republic of Congo (Congo) filed an application to the International Court of Justice instituting proceedings against Belgium in respect of a dispute concerning an international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against Mr Abdulaye Yerodia Ndombasi, the Minister for Foreign Affairs in office of Congo.<sup>21</sup> In the application, Congo stated that Belgium had violated the principle that a State may not exercise its authority on the territory of another State, the principle of sovereign equality as well as the diplomatic

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<sup>19</sup> Amnesty International, *Universal Jurisdiction: Belgian Court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, available at [http://web.amnesty.org/library/pdf/IO530012002ENGLISH/\\$File/IO5300102.pdf](http://web.amnesty.org/library/pdf/IO530012002ENGLISH/$File/IO5300102.pdf). See p. 13, note 31. Last accessed 13 May 2005.

<sup>20</sup> Statute of the International Court of Justice, available at <http://www.icj-cij.org/icjwww/basicdocuments/basicstatute.htm>. Last accessed 13 May 2005.

<sup>21</sup> International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002 (Yerodia Case). The judgment is available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>. Last accessed 13 May 2005.



immunity of the Minister for Foreign Affairs of a sovereign State. The Belgian judge had issued an arrest warrant *in absentia* against Yerodia charging him with offences constituting grave breaches against the Geneva Conventions from 1949 and of the additional protocols thereto and with crimes against humanity. Yerodia was accused of having made various speeches inciting racial hatred during the month of August 1998. At the time when the alleged crimes took place, Yerodia was not yet Minister of Foreign Affairs. At the issuance of the arrest warrant, however, Yerodia was the current Minister for Foreign Affairs of Congo. According to Congo, a Minister for Foreign Affairs of a sovereign State during his term of office is entitled to inviolability and to immunity from criminal process, which should be absolute, meaning that no exceptions are allowed.<sup>22</sup> Also, the Congo added, the immunity accorded to Ministers for Foreign Affairs when in office covers all acts, including those committed before they took office, and that it is irrelevant whether the acts taken during the holding of office may be characterized as official or not.<sup>23</sup> Congo further claimed that Yerodia, as an incumbent Minister for Foreign Affairs enjoyed immunity from criminal prosecution before Belgian courts and that the issuance of the arrest warrant violated this immunity. Belgium maintained that Ministers for Foreign Affairs in office generally do enjoy immunity from jurisdiction before the courts of a foreign State but such immunity only applies to acts carried out in the course of their official duties and that it cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.<sup>24</sup> Belgium further stated that Yerodia did not enjoy any immunity at the time when the alleged crimes took place and that there existed no evidence that he was acting in his official capacity.

The International Court of Justice started with determining what immunity Ministers for Foreign Affairs can enjoy. The court concluded that: "...the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."<sup>25</sup> The immunity and inviolability protect the Minister against any act of authority of another State, which would hinder him in the performance of his duties. The court further said that no distinction could be made between acts performed by a Minister for Foreign Affairs in an "official" capacity and those claimed to have been performed in a "private" capacity or for that matter acts performed before the individual assumed office and acts committed during that period of office. The ICJ continued "...if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an

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<sup>22</sup> Yerodia Case para. 47.

<sup>23</sup> *Ibid.*

<sup>24</sup> Yerodia Case para. 49.

<sup>25</sup> *Ibid.* para. 54.

“official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity.”<sup>26</sup>

Belgium argued that the immunities accorded to incumbent Ministers for Foreign Affairs in no case could protect them when they are suspected of having committed war crimes or crimes against humanity. In support of this argument, Belgium referred to various legal instruments creating international criminal tribunals and examples from national legislations and the judicial decisions from international and national courts. The court addressed Belgium’s argument with an examination of State practise and concluded that it was “...unable to deduce from this practise that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”<sup>27</sup> The ICJ further stated that none of the rules containing the legal instruments creating international criminal tribunals “...likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.”<sup>28</sup> As a result, the International Court of Justice denied in its ruling any finding of an exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against the humanity.

The court noticeably wanted to emphasize that immunity from jurisdiction did not mean impunity for these incumbent Ministers for Foreign Affairs in respect of any crimes they might have committed, and said that “[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”<sup>29</sup> The court stated four examples when immunities under international law did not represent a bar to prosecution.<sup>30</sup>

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or

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<sup>26</sup> *Ibid.* para. 55.

<sup>27</sup> *Ibid.* para. 58.

<sup>28</sup> *Ibid.*

<sup>29</sup> Yerodia Case para. 60.

<sup>30</sup> *Ibid.* para. 61.

subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities 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".

It is the third example given by the International Court of Justice that has attracted the most attention. Here, the court held that a Foreign Minister who has ceased to hold office may be tried for acts committed prior or during his period of office taken in a private capacity.

The court then had to consider if the issuance of the arrest warrant of 11 April 2000 and its circulation as such violated Congo's immunity. In this respect the ICJ stated, "...the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."<sup>31</sup> Belgium was ordered by the ICJ to cancel the arrest warrant and inform the authorities to whom it was circulated.

## 2.3 Dissenting Voices

That immunity prevails as long as the Minister is in office and only continues to shield him for official acts is something the judges Higgins, Kooijmans and Buergenthal agree to in their joint separate opinion.<sup>32</sup> The judges however go a step further than the court and claim that, by pointing to the legal literature, international crimes cannot be regarded as official acts because they are not normal State functions or functions that a State on its own can perform.<sup>33</sup> Furthermore, Judge Van den Wyngaert disagrees with the ICJ in her dissenting opinion.<sup>34</sup> Van den Wyngaert maintains that the court was wrong when it concluded that there is a rule that grants full immunity to incumbent Ministers for Foreign Affairs in customary international law and that there is no rule of customary international law departing from this rule in the case of war crimes and crimes against humanity.<sup>35</sup> Her argument against the rule in customary international law that grants full immunity to incumbent Ministers for Foreign Affairs is that

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<sup>31</sup> *Ibid.* para. 70.

<sup>32</sup> Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal annexed to the Yerodia Case *supra* note 21.

<sup>33</sup> *Ibid.* para. 85.

<sup>34</sup> Dissenting Opinion of Judge Van den Wyngaert annexed to the Yerodia Case *supra* note 21.

<sup>35</sup> *Ibid.* para. 10.

the court failed to show enough evidence in support of this proposition. A more rigorous approach concerning the examination of State practise and *opinio juris* would have been welcome, according to Van den Wyngaert.<sup>36</sup> Concerning the rule according immunity to incumbent Ministers for Foreign Affairs even when charged with war crimes and crimes against the humanity, Van den Wyngaert maintains that war crimes and crimes against humanity might be considered so-called *jus cogens* crimes and therefore should attain a higher status than the rules on immunities and hence, prevail.<sup>37</sup> In addition, Amnesty International is of the belief that the ICJ was wrong on the status of customary international law. The organization argues that there is no convincing evidence of a customary rule giving incumbent Government Officials immunity in front of a foreign court for war crimes and crimes against humanity and the ICJ failed to show such evidence in the form of State practise and *opinio juris*.<sup>38</sup>

Is the reasoning of the International Court of Justice in compliance with modern international law? As mentioned above, the court has been heavily criticized for its ruling by legal scholars and international organizations such as the Amnesty International. Some legal writers argue that the ICJ was wrong in its *obiter dictum* to accord immunity to a former Minister for Foreign Affairs for official acts because they believe that there already exists a customary international rule that lifts immunity for international crimes no matter what type of act.<sup>39</sup> The ICJ confirms in this judgment the full and absolute immunity for incumbent Ministers for Foreign Affairs as well as the establishment of an unrestricted immunity for all official acts for former Foreign Ministers. The *Yerodia* case has to have come quite inconveniently for those legal scholars who had supported the existence of a new customary rule because the judgment quashes every idea of a possible limitation of immunity for former Heads of State acting in an official capacity regarding international crimes.

## 2.4 Effects of the ruling

Belgium's so called "anti-atrocity law", which provided the Belgian court with jurisdiction to prosecute Yerodia, recognized universal jurisdiction, meaning that the court had jurisdiction no matter where the offences were

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<sup>36</sup> *Ibid.* para. 11.

<sup>37</sup> *Ibid.* para. 28.

<sup>38</sup> Amnesty International, *Universal Jurisdiction: Belgian Court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, available at [http://web.amnesty.org/library/pdf/IOR530012002ENGLISH/\\$File/IOR5300102.pdf](http://web.amnesty.org/library/pdf/IOR530012002ENGLISH/$File/IOR5300102.pdf). See p. 5. Last accessed 13 May 2005.

<sup>39</sup> See for instance Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation* and Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*.

committed.<sup>40</sup> The ICJ avoided taking position on whether Belgium's assertion of universal jurisdiction was legal or not and simply stated, "...jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."<sup>41</sup> Article 5 (3) of the Belgian Law stated that "[t]he immunity attributed to the official capacity of a person does not prevent the application of the present Act." The article did not make any distinction between former and current officials. It was obvious after the ICJ's decision in *Yerodia* that this provision had to be amended. The amendment contains a provision that states, "[i]nternational immunity, derived from a person's official capacity does not prevent the application of the present law except under those limits established under international law."<sup>42</sup> This was later clarified by a new amendment in August 2003, which specifically states that "[i]n accordance with international law, there shall be no prosecution with regard to: Heads of State, heads of government, and foreign ministers of foreign affairs, during their terms of office..."<sup>43</sup> The law has also been amended concerning universal jurisdiction. Even though Belgian courts still have the nominally universal jurisdiction independently of where the crimes have been committed and whether the alleged offender is located within Belgium or not, the amendment now requires a Belgian nexus. Article 7 (1) now proclaims

The criminal action will nonetheless be subject to the request of the federal prosecutor if: 1. the violation was not committed on Belgian territory; 2. the alleged offender is not Belgian; 3. the alleged offender is not located within the Belgian territory; 4. the victim is not Belgian or has not resided in Belgium for at least three years.<sup>44</sup>

Belgium has thus restricted the reach of universal jurisdiction in its courts by adopting this new law, which has the implication that individuals no longer can initiate criminal action whenever any of the above conditions are met. Any action will then be at the discretion of the federal prosecutor who for example can decide that the case should be better brought in the criminal's home State or in front of an international tribunal.<sup>45</sup>

The outcome of the *Yerodia* case was very much anticipated by legal scholars and States around the world and seen as the judgement that would

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<sup>40</sup> See article 7 of the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law." An English translation of the act is available in ILM, Vol. 38, p. 918, 1999.

<sup>41</sup> *Yerodia* Case *supra* note 21, para. 59.

<sup>42</sup> See Article 4 of Belgium's Amendment to the Law of June 15, 1993 (as amended by the law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law. An English translation of the amendment is available in ILM, Vol. 42, p. 749, 2003.

<sup>43</sup> See article 13 of Belgium's Amendment to the Law of June 15, 1993 (as amended by the law of February 10, 1999 and April 23, 2003) Concerning the Punishment of Grave Breaches of Humanitarian Law. An English translation of the amendment is available in ILM, Vol. 42, p. 1258, 2003. The Amendment entered into force on 7 August 2003.

<sup>44</sup> See article 5 of Belgium's Amendment to the Law of June 15, 1993 (as amended by the law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, an English translation of the amendment is available in ILM Vol. 42, p. 749, 2003.

<sup>45</sup> *Ibid.*

bring clarity to a difficult question and set precedence for the future. The problem with this decision is that the first real opportunity the ICJ had to find a new balance between State sovereignty and the need to prosecute severe criminals should come with such terrible timing. The ICJ tried to settle the difficult question of personal immunities for high State Officials at a time when the law was at an uncertain stage and State practise only just in its early development. The International Court of Justice did come up with an answer to this difficult question but the legal scholars, apparently, were not pleased with it.

After the *Yerodia* case it is clear that two options remain in international law in order to make it possible for a national court to prosecute a foreign Head of State accused of international crimes. The first option is the alleged existence of an exception in customary international law that will allow the lifting of immunity for Heads of State when they have committed international crimes. This exception should only come into force for the perpetration of international crimes, since these crimes are considered so horrible that their perpetrators must be held accountable for their actions and not be able to walk free. That this exception is considered customary international law already is envisaged by legal writers such as Cassese, Wirth, Zappalà and Bianchi.<sup>46</sup> The second option for prosecution becomes available if we treat international crimes as crimes committed in a private capacity. That this is a plausible option became clear when the ICJ said that a former Minister for Foreign Affairs of another State may be tried in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.<sup>47</sup> The starting point for this thesis is that an incumbent Head of State enjoys immunity from criminal jurisdiction in a foreign State and a former Head of State enjoys the same immunity for all acts performed in an official capacity. Therefore, I intend to investigate the two options in order to observe if they remain credible alternatives to the concept of immunity.

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<sup>46</sup> *Supra* note 39.

<sup>47</sup> *Yerodia Case supra* note 21, para. 61.

# 3 Immunity

## 3.1 Definition of Immunity

Within international law, immunity from jurisdiction for Heads of State, Heads of Government, Foreign Ministers and other State officials is considered an essential feature for the functioning of international relations. If a State representative on an official visit to another State would be subject to a legal proceeding in that other State, his ability to function would be seriously damaged.<sup>48</sup> It is important to remember though, that immunity from jurisdiction does not mean impunity, but simply creates an exception to the right to prosecute a person.

The law relating to the rules on immunity for individuals is governed by customary international law. There exists no single definition on the concept of immunity. The concept of immunity refers to situations when a foreign individual can claim to be exempt from another State's administrative, criminal and executive jurisdiction. An individual enjoying this immunity can for example not be arrested, detained, tried or punished. Both the State and its individuals can enjoy immunity, but on different grounds. A State enjoys immunity based on State sovereignty – all States are sovereign and no State can claim to exercise jurisdiction over another: *par in parem non habet imperium*. Regarding Heads of State, Heads of Government, Foreign Ministers and other State officials there is no existence of a comprehensive written legal source. The rules governing individual immunity are instead found in conventions, custom and through analogies to conventions. Diplomats, however, enjoy their immunity through the Vienna Convention on Diplomatic Relations.<sup>49</sup>

## 3.2 Immunity *Ratione Personae* (Procedural Immunity) and Immunity *Ratione Materiae* (Substantive Immunity)

Customary international law makes a distinction between immunity *ratione personae* and immunity *ratione materiae*. The first immunity is linked to the person in his official capacity as State Official. The individual is immune because of his official status. The second immunity is linked to the act concerned. The individual is immune because of the action's official status. It is possible for an individual to enjoy both types of immunity at the same time.

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<sup>48</sup> Watts p. 106.

<sup>49</sup> Vienna Convention on Diplomatic Relations, 1961, United Nations, *Treaty Series*, vol. 500, p. 95. The Convention entered into force 24 April 1964.

### 3.2.1 Procedural Immunity

Immunity *ratione personae*, or procedural immunity, is the immunity an individual enjoys because of his official status. Through his official position, the Head of State acts as a representative of his State and therefore enjoys procedural immunity. This immunity covers all actions taken before or during office, both private and official, while the individual is holding office. Because of the fact that the immunity is accorded on behalf of the official position, when the individual leaves his office and functions, he can no longer enjoy any procedural immunity. This immunity, being linked to the official position of the person, could be compared to diplomatic immunity of a serving diplomat in the Vienna Convention on Diplomatic Relations, article 31, which says that the diplomatic agent enjoys full immunity from criminal jurisdiction of a receiving State.

### 3.2.2 Substantive Immunity

Immunity *ratione materiae*, or substantive immunity, is the immunity an individual holds because of the official status of the act carried out. Thus, immunity is given to the person because of the character of the act he performs. A distinction can be made between sovereign and non-sovereign acts. Substantive immunity exists parallel alongside with procedural immunity for the time the official is holding office and it will become highly relevant after he ceases to hold office. Although it is the character of the act that accords immunity, in the end, the immunity is given to the Head of State, and hence, becomes an individual immunity. Since substantive immunity is connected to the character of the act, this immunity will stay intact even though the official position of the individual changes or disappears.

## 3.3 Heads of State

Historically, States attained their sovereignty from the Head of State's personal sovereignty. The State was more or less seen as the property of the Head of State and no distinction was made between the two.<sup>50</sup> Today modern international law considers the rights given to a Head of State as something accorded to them in their capacity as highest representatives of their State, rather than inherently in their own right.<sup>51</sup> While the Head of State is holding office, he is protected against foreign jurisdiction because of his immunity *ratione personae* and he can therefore not be sued for any acts whether taken in a private or official capacity. After leaving office, the Head of State enjoys immunity *ratione materiae* for all acts committed in an official capacity, which means that he can only be subject to prosecution regarding acts taken in a private capacity.<sup>52</sup> Head of State immunity is

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<sup>50</sup> Watts p. 35.

<sup>51</sup> *Ibid.* p. 35-36.

<sup>52</sup> *Ibid.* p. 88.



regarded a functional immunity, meaning that it is closely linked to the functions of the Head of State.<sup>53</sup> Some international instruments contain references to Heads of State. Such a legal source for the Head of State immunity can be found in the 1969 Convention on Special Missions and its article 21 (1). The article reads, “[t]he Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.”<sup>54</sup> However, the application of the convention is limited because it only affects special missions in the meaning of the convention. The United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the GA in December 2004, expressly mentions the position of Heads of State.<sup>55</sup> Article 3, paragraph 2, of the convention states that, “[t]he present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.” The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents from 1973 also mentions Heads of State.<sup>56</sup> The definition of “internationally protected persons”, in article 1 (1) (a), includes “a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned.” Even if one should be very careful with analogies, it might be in place here concerning the articles in the Vienna Convention on Diplomatic Relations from 1961, which in some aspects could be relevant to the position of Heads of State.

### 3.4 Heads of Government and Foreign Ministers

It is not completely clear if Heads of Government and Foreign Ministers should be accorded the same immunity as the one Heads of State enjoy. It can be argued that they do not have the same high status as Heads of State and therefore only should enjoy a lesser degree of immunity.<sup>57</sup> It is however common in some States that the Head of State is purely a figurehead without political power whereas the Head of Government has the real political power. In these States, it is evident that the Head of Government must be given the same protection as Heads of other States sharing the same functions. The Foreign Ministry’s office is involved in the conduct of

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<sup>53</sup> Bröhmer p. 367.

<sup>54</sup> Convention on Special Missions, 1969, United Nations, *Treaty Series*, vol.1400, p. 231. The Convention entered into force 21 June 1985.

<sup>55</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Resolution A/RES 59/38, 16 December 2004. The Convention opened for signature on 17 January 2005.

<sup>56</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, United Nations, *Treaty Series*, vol.1035, p. 167. The Convention entered into force 20 February 1977.

<sup>57</sup> See for example Watts p. 102, where he argues that Heads of Government and Foreign Ministers do not personify their State the same way a Head of State does and therefore should not be given the same special treatment.

international relations and therefore the powers of the Foreign Minister covers the full range of their State's international activities.<sup>58</sup> Article 7 (2) of the Vienna Convention on the Law of Treaties provides that for the purpose of performing all acts relating to the conclusion of a treaty, the Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their State in virtue of their functions and without having to produce full powers.<sup>59</sup> The Foreign Minister is usually the person preparing the necessary instrument for ratification of international treaties.<sup>60</sup> For that reason, the powers of the Foreign Minister must be considered at least significant. Consequently, it can be argued that even if Heads of State, Heads of Government and Foreign Ministers do not share exactly the same functions, they all enjoy an immunity that exists on a functional basis and as a result, enjoy the same protection. After the *Yerodia* case, it seems clear that Heads of Government and Foreign ministers enjoy the same immunity as Heads of State.<sup>61</sup> Therefore, when using the term "Head of State immunity" in this thesis, I incorporate the immunity accorded to Heads of Government and Foreign Ministers as well.

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<sup>58</sup> Watts p. 100.

<sup>59</sup> Vienna Convention on the Law of Treaties, 1969, United Nations, *Treaty Series*, vol. 1155, p. 331. The Convention entered into force on 27 January 1980.

<sup>60</sup> Watts p. 101.

<sup>61</sup> Although, in the *Yerodia* Case, some dissenting judges were of a different opinion. See for instance Judge Van Den Wyngaert in her dissenting opinion. See also the Institut de Droit Internationals Resolution on the Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law article 15 that accords the Head of Government the same immunity as the Head of State.

## 4 Can Immunity Be Lifted?

In the previous chapter, I have discussed the immunity accorded to Heads of State. In this chapter, I will examine the question of limitation of immunity, given that we know that immunity is not absolute. For instance, it is accepted as customary international law that after the Head of State leaves office he can no longer enjoy any procedural immunity. Also, accepted as customary law is the notion that former Heads of State enjoy substantive immunity for their official acts.<sup>62</sup> Therefore, immunity can no longer be considered absolute because it has been restricted. In the legal doctrine, it has been put forward that there exists an additional rule in customary international law that lifts the immunity in case of the perpetration of international crimes.<sup>63</sup> My intention now is to investigate if such a new rule has progressed. First I will make a brief examination of the practise of the international tribunals. After that, I will make an investigation of how national courts have treated the subject of immunity and the question if it can be lifted with reference to international crimes.

The reason for choosing to separate the practise of the international tribunals from the practise of national courts is that these two types of jurisdictions are founded on different jurisdictional bases. For example, a national of State A is facing proceedings in front of an international tribunal. In order for the international tribunal to have jurisdiction to try this national, State A has to have consented to the jurisdiction of the tribunal, often by ratifying the treaty founding its statute. State A has therefore, beforehand, waived the immunity for its national by either ratifying a treaty establishing the tribunal (as the case is with the International Criminal Court) or waiving it as a member of the United Nations (this is valid for the ICTY and ICTR which were established through Security Council Resolutions). An explicit waiver of immunity has indeed taken place since treaty ratification demands a positive act by the State. By doing this, State A has in fact limited its State sovereignty. The same limitation of State sovereignty cannot be said to have taken place if the same national of State A instead is facing proceedings in front of a national court of State B, because State B establishes its claim to jurisdiction on international law. These are two very different types of jurisdictions and I believe that it is necessary to separate them.

### 4.1 International Jurisdictions

The history of international tribunals and personal criminal responsibility can be traced back to the end of World War I and the treaty of Versailles.<sup>64</sup> Article 227 of the treaty contains a provision stating that the German Ex-Emperor should be held responsible for "...a supreme offence against

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<sup>62</sup> See section 3.2.1 and 3.2.2.

<sup>63</sup> Compare Cassese 2002 p. 870, Wirth 2002 p. 888 and Zappalà p. 595.

<sup>64</sup> Treaty of Versailles, available on <http://www.firstworldwar.com/source/versailles.htm>. Last accessed 13 May 2005.

international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused...” The trial was never held though, because of the Netherland’s refusal to extradite the former Emperor.<sup>65</sup>

The United States was the chief promoter of the creation of an international tribunal, the Nuremberg Tribunal, to judge German war criminals. In Nuremberg, the defendants were accused of having committed crimes against international law and the law and customs of warfare.<sup>66</sup> Article 7 of the Nuremberg Charter reads

The official position of Defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.<sup>67</sup>

Several German leaders were tried by the Nuremberg Tribunal based on their individual criminal responsibility.

The Tokyo Tribunal, founded after World War II, was essentially an American project and it was solely Americans who drafted the charter.<sup>68</sup> The Tokyo trials declared that individuals can be subjects of international law and that no protection of the representatives of a State can be applied to acts that are condemned as criminal by international law.<sup>69</sup>

The creation of the International Criminal Tribunals of Yugoslavia and Rwanda was approved by the Security Council as an enforcement measure under chapter VII of the UN Charter.<sup>70</sup> The Security Council determined in both cases that the widespread and flagrant violations of international humanitarian law constituted a threat to international peace and security. The statutes of the ICTY and ICTR contain an almost similar provision as that in Nuremberg which reads

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.<sup>71</sup>

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<sup>65</sup> Beigbeder p. 28.

<sup>66</sup> Woetzel p. 35.

<sup>67</sup> Charter of the International Military Tribunal, 8 August 1945, United Nations, *Treaty Series*, vol. 82, p. 284.

<sup>68</sup> Beigbeder p. 55.

<sup>69</sup> Woetzel p. 231.

<sup>70</sup> Charter of the United Nations, 1945, available at <http://www.un.org/aboutun/charter/>. The Charter entered into force 24 October 1945. Last accessed 13 May 2005.

<sup>71</sup> Article 7 (2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Sess., 3175<sup>th</sup> mtg., U.N. Doc. S/RES/808 (1993) *annexed to Report of the Secretary-General pursuant to Paragraph 2 of U.N. Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 & Add.1(1993), available on <http://www.un.org/icty/legaldoc/index.htm> and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) available at <http://www.ictcr.org/ENGLISH/basicdocs/statute/2004.pdf>. Last accessed 13 May 2005.

The establishment of the 1998 Rome Statute of the International Criminal Court was an historical achievement for the world. The work on the establishment of a permanent international criminal court had begun by the League of Nations as early as in 1937.<sup>72</sup> The work was finished in 1998 and the Rome Statute entered into force 1 July 2002.<sup>73</sup> Article 27 of the statute reads as follows

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 jurisdictions over such a person.

Article 27 (1) is dealing with the individual criminal responsibility. Article 27 (2) is a novelty in these situations since it is the first article contained in an international tribunal's statute that expressly deals with the question of immunity.

The manner in which the tribunal was established will have an effect on the availability of immunity for the defendant. The ICTY and ICTR were both adopted by a resolution of the Security Council using its mandatory powers under chapter VII of the UN Charter. The limitation of immunity for defendants in front of these courts is an obligation on all member States of the UN. Since the ICC was established through a treaty, only member States to this treaty have limited the immunity for defendants. In reference to the Nuremberg Tribunal, no German Government subscribed to the Charter or gave its consent to its jurisdiction over German nationals. For this reason, there was some German objections to the Tribunal and that it should not be considered binding on non-contracting parties to the treaty that forms its basis.<sup>74</sup> However, since the Tribunal had the consent and approval of the international community, it has to be considered an international tribunal.<sup>75</sup>

#### **4.1.1 Immunity *Ratione Personae* and Immunity *Ratione Materiae***

As demonstrated above, the immunity for Heads of State in front of international tribunals has been limited regarding international crimes covered in their statutes. This is accurate for the immunity *ratione materiae*. Starting with the Nuremberg Tribunal where the defendants were not able to

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<sup>72</sup> Bassiouni p. 434.

<sup>73</sup> Rome Statute of the International Criminal Court, 1998, United Nations, *Treaty Series*, vol. 2187, p. 3. The Statute entered into force 1 July 2002.

<sup>74</sup> Woetzel p. 43.

<sup>75</sup> *Ibid.* p. 49.

hide behind their substantive immunity and therefore prosecuted when suspected of having committed international crimes. It is difficult to say anything about the procedural immunity here, because the defendants in Nuremberg did not hold their official positions any longer. It has, however, been argued that the Charter also would allow the lifting of the procedural immunity.<sup>76</sup> In Tokyo, even though the Emperor Hirohito had approved the decision to declare war in the Pacific, a political decision granted immunity to him in order to maintain the constitutional legal order of Japan.<sup>77</sup> Despite this decision, the Tokyo trial can be said to have confirmed and reinforced the Nuremberg precedent. The ICTY and the ICTR also followed the Nuremberg example and prosecuted persons accused of international crimes, and hence, limited the substantive immunity. The former Prime Minister of Rwanda, Jean Kambanda, was charged in front of the ICTR with genocide and crimes against humanity. The final verdict does not however contain any discussion on the issue of immunity.<sup>78</sup>

The immunity *ratione personae* have been perceived as a bar to prosecution for sitting Heads of States as long as they are in office. In May 1999, the ICTY did however prosecute a sitting president, Slobodan Milosevic, charged with crimes against humanity and violations of the laws or customs of war.<sup>79</sup> This could be seen as evidence of tendencies towards a new legal rule limiting immunity not only *ratione materiae* but also *ratione personae* in front of international tribunals. The recently established International Criminal Court has so far not produced any case law. It has been claimed that the first paragraph of Article 27 in the Statute deals with substantive immunity and that the second paragraph deals with procedural immunity meaning that it limits the immunity *ratione personae*. This would mean that the ICC has the opportunity to prosecute also incumbent Heads of State and hence, no immunity is valid in front of the International Criminal Court.<sup>80</sup> According to the ICJ in the *Yerodia* judgment, incumbent Ministers for Foreign Affairs may be subjects to criminal proceedings before international courts, given their jurisdiction.<sup>81</sup> It is not completely obvious that this is the

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<sup>76</sup> Watts argues on page 83 that had Adolf Hitler not died before hand, he would have been tried before the Nuremberg Tribunal, notwithstanding his status as leader of Germany.

<sup>77</sup> Beigbeder p. 74.

<sup>78</sup> Jean Kambanda v. The Prosecutor. Case No. ICTR 97-23-A, (19 October 2000), available at the ICTR website, <http://www.ictor.org/>. Last accessed 13 May 2005.

<sup>79</sup> Prosecutor v. Milosevic (Indictment) (24 May 1999), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>. Last accessed 13 May 2005.

<sup>80</sup> Sarooshi highlights an interesting situation in this context on page 393 in his *The Statute of the International Criminal Court*. The situation arises when a Head of State is granted amnesty in his home country and the possible legal difficulties the ICC would face trying to exercise jurisdiction over such a person (see article 17 (2) of the Rome Statute). Article 17 (1) of the Statute provides that the Court shall determine that a case is inadmissible where "...the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute..." The question arises what consequences the grant of amnesty to a person by a State under its domestic law will have. The ICC is allowed, however, to ascertain itself that the grant of amnesty was not given in order to shield the person from prosecution before the court, in which case the State is considered unwilling.

<sup>81</sup> *Yerodia* Case *supra* note 21, para. 61.

final truth, since there are differing opinions. According to the Commentary to the Princeton Principles on Universal Jurisdiction, neither the statutes of the ICTY, nor those of the ICTR, address the issue of procedural immunity.<sup>82</sup> The indictment of Milosevic in front of the ICTY does however point in a different direction. What can be said for sure is that the substantive immunity can be lifted in front of international tribunals regarding international crimes; this has been proved by the vast amount of case law stemming from the tribunals. As I mentioned above, trying to conclude something similar for the procedural immunity, cannot be done with the same certainty. This type of immunity has been lifted in the past and it would not be wrong to argue that this could be evidence of a new trend. Today, nevertheless, it seems to be too early to assume that no immunity can be available to incumbent Heads of State in front of international tribunals.

## 4.2 National Jurisdictions

There are a number of international treaties and conventions on the prevention and punishment of certain international crimes that impose the obligation upon States to prosecute or extradite, *aut dedere, aut judicare*. This, however, does not mean that the customary rules on immunity are ignored.<sup>83</sup> Questions of jurisdiction have to be separated from questions of immunity. The immunities for Heads of State are still opposable in front of national jurisdictions. The rules on immunities in front of national jurisdictions therefore, have to be recovered from customary international law.

### 4.2.1 Immunity Ratione Personae

#### 4.2.1.1 Lafontant v. Aristide

The US District Court of New York decided the *Lafontant v. Aristide* case in January 1994.<sup>84</sup> Roger Lafontant was serving a life sentence in Haiti for leading an unsuccessful *coup d'état* against the government of President Jean-Bertrand Aristide. On September 29 in 1991, Lafontant was shot and murdered in jail. Lafontant's widow, Gladys M. Lafontant, brought suit against President Aristide alleging that he was the one who had ordered the murder.<sup>85</sup> At that time, Aristide was living in exile in the United States after a successful military coup but was recognized as the lawful Head of State by the United States government. Aristide claimed that he, as the recognized Head of State of the Republic of Haiti, should be immune from suit in the

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<sup>82</sup> Commentary on the Princeton Principles, *supra* note 12, p. 50.

<sup>83</sup> Yerodia Case *supra* note 21, para. 59.

<sup>84</sup> *Lafontant v. Aristide*. 844 F Supp. 128. U.S. District Court. E.D.N.Y., January 27, 1994 (Lafontant v. Aristide). F Supp is available at WestLaw International, <http://international.westlaw.com>. Last accessed 13 May 2005.

<sup>85</sup> *Lafontant v. Aristide*. p. 130.

United States. The justice department suggested that it would be incompatible with the United States' foreign policy interests to permit the action to proceed against President Aristide.<sup>86</sup> The plaintiff argued that it would be wrong to give immunity to Aristide because immunity only extends to official acts. She withheld that the extrajudicial killing of her husband in no way could be regarded as an official act.<sup>87</sup> The court's response to this was that the court did not need to establish if the ordering of the killing would be official or private because the plaintiff's claim in nature: "...is irrelevant because Congress continued head-of-state immunity..."<sup>88</sup> The court further stated in its judgment that, "[a] head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States."<sup>89</sup> Even though the plaintiff contended that the Republic of Haiti had waived President Aristide's immunity, the US court said that it had to rely on the Executive's (the President of the United States) determination of who is lawful Head of State.<sup>90</sup>

The court granted immunity to President Aristide and dismissed the case based on his Head of State status. The judgment represents a clear-cut case where a national court grants absolute procedural immunity to a foreign Head of State on account of his position as incumbent Head of State. It is only the person which the United States government recognizes as the official Head of State that can be accorded immunity in the US, and it is obvious that the District Court awarded a great deal of weight to the President's determination of who should be accorded Head of State status. In addition, as demonstrated by the US court, there was no need to clarify whether the killing of Lafontant was executed in a private or official capacity because this case concerned an incumbent Head of State, and the immunity *ratione personae* will protect the person as long as he remains in office.

#### 4.2.1.2 Pinochet Case

The *Pinochet* case relates to the prosecution of a former Head of State. Since the immunity *ratione personae* only stays intact through the duration of office, the House of Lords was predominantly occupied with the immunity *ratione materiae*. The law lords did however discuss the topic of incumbent Heads of State, and there was no disagreement between them on the question of the immunity *ratione personae*. For example, Lord Browne-Wilkinson stated that incumbent Heads of State enjoy "...a complete immunity attaching to the person of the head of state...and rendering him immune from all actions or prosecutions whether or not they relate to

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<sup>86</sup> *Ibid.* p. 131.

<sup>87</sup> *Ibid.* p. 137.

<sup>88</sup> *Ibid.* p. 139-140.

<sup>89</sup> *Ibid.* p. 131-132.

<sup>90</sup> *Ibid.* p. 134.



matters done for the benefit of the state”.<sup>91</sup> The majority of the law lords shared Lord Browne-Wilkinson’s opinion and thus, awarded absolute procedural immunity to incumbent Heads of State.

#### 4.2.1.3 Fidel Castro Case

The arrest of General Augusto Pinochet in London 1998 certainly awoke the international interest in the possibility of trying Heads of State responsible for international crimes. Since Spanish law contained a provision that provided for absolute universal jurisdiction even before Belgian law did, it was not surprising that the Audiencia Nacional de España (Spain’s highest court) made its ruling in the case against *Fidel Castro* in March 1999.<sup>92</sup> The case concerned the sinking of a hijacked tugboat containing civilians fleeing from Cuba. A report made by the Inter-American Commission of Human Rights concluded that Cuba had violated the right to life of forty-one people who had died when the Cuban government’s boats rammed, flooded, and sank the tugboat.<sup>93</sup> The report also found that Cuba was responsible of violating the right of personal integrity of the thirty-one survivors of the sinking boat, and had violated the rights to transit and justice of all of the seventy-two persons who attempted to leave Cuba.

In November 1998, the Cuban American National Foundation, an anti-Castro organization of Cuban exiles, filed a lawsuit against Castro in Madrid alleging that he had committed genocide, terrorism, and torture.<sup>94</sup> The High Court judge, Ismael Moreno Chamarro, dismissed the case because the “...facts presented in the complaint did not constitute genocide or torture and on the controversial grounds that states cannot commit terrorism.”<sup>95</sup> Chamarro further said that as an incumbent Head of State “...Fidel Castro was immune from prosecution in Spain.”<sup>96</sup> The Cuban American National Foundation appealed this ruling and the case later went up for review to the Spanish Supreme Court. In the Audiencia Nacional, the court held that they could not exercise its criminal jurisdiction provided for in their Law on the Judicial Power for the crimes attributed to Castro. Fidel

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<sup>91</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), England, House of Lords, 24 March 1999, available in *International Law Reports*, Vol. 119, pp. 135-252, (Pinochet No. 3). See p. 153.

<sup>92</sup> Order (auto) of 4 March 1999 (no. 1999/2723). Due to my lack of knowledge of the Spanish language, I had to rely on Cassese’s translation in his *International Criminal Law* from 2003 on page 272, note 20. For the Spanish version of the judgment see the CD-Rom, EL DERECHO, 2002, Criminal Jurisprudence, available also online at <http://www.derechos.org/nizkor/espana/>. Last accessed 13 May 2005.

<sup>93</sup> Human Rights Watch Report on Cuba 1999, the report is available at <http://www.hrw.org/reports/1999/cuba/Cuba996.htm#TopOfPage>. Last accessed 13 May 2005.

<sup>94</sup> Human Rights Watch Report on Cuba 1999, [http://www.hrw.org/reports/1999/cuba/Cuba996-11.htm#P1946\\_491585](http://www.hrw.org/reports/1999/cuba/Cuba996-11.htm#P1946_491585). Last accessed 13 May 2005.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

Castro held the position as incumbent Head of State and as a result, the provisions of the Law on the Judicial Power could not be applied to him.<sup>97</sup> The provisions were not applicable to Heads of State, who consequently enjoyed immunity from prosecution on account of the international rules to which the relevant articles of the law referred. The court further said that as long as Castro remained in office, he could not be prosecuted in Spain, not even for international crimes contained in the Spanish criminal law.<sup>98</sup> The court held that the judgment was not inconsistent with its former ruling concerning the request for Pinochet's extradition, because Pinochet was a former Head of State and as such not entitled to immunity from jurisdiction.<sup>99</sup>

The court's statement on the immunity, which is to be accorded to former Heads of State, does not reveal the type of immunity discussed. It is clear that a former Head of State can have no success with a claim to procedural immunity since this immunity is attached to the official status of the person. Another interpretation of the statement could lead to the conclusion that once Fidel Castro leaves office, he becomes liable to prosecution.<sup>100</sup> The consequence of such an interpretation is that the judgement supports the limitation of immunity *ratione materiae* for former Heads of State accused of committing international crimes. Whether this was the intention of the court is difficult to identify. An uncontroversial issue however, is that the *Fidel Castro* case clearly recognizes absolute immunity *ratione personae* to incumbent Heads of State, this also with reference to international crimes.

#### 4.2.1.4 Gaddafi Case

In 1989, a DC 10 airplane exploded over the desert above Chad killing all 170 passengers and crew onboard, including a number of French passengers. A French criminal investigation found evidence leading to the Libyan Secret Police and six of its members were tried and convicted by the Special Court of Assizes of Paris. Relatives of the victims and an organization, which pursued the perpetrators of terrorist attacks, applied for criminal proceedings against Mouammar Gaddafi, Head of State in Libya, alleging that he was implicated in the attack. Gaddafi was charged with murder for complicity in a terrorist action. The Prosecutor filed a motion for annulment of the whole procedure before the Cour de Cassation (Supreme Court), based on the principle of immunity for Heads of State.

The French Cour de Cassation delivered its judgment in the *Gaddafi* case on 13 March 2001.<sup>101</sup> The court considered the general principles of

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<sup>97</sup> Cassese 2002 p. 861.

<sup>98</sup> *Ibid.*

<sup>99</sup> Cassese 2002 p. 860-861, note 21.

<sup>100</sup> This interpretation was made by Cassese 2002 on p. 866.

<sup>101</sup> *Arrêt n° 1414 du 13 mars 2001 de la Cour de cassation – Chambre criminelle, Sur le moyen unique de cassation, pris de la violation du droit pénal coutumier international relatif à l'immunité de juridiction reconnue aux chefs d'Etat étrangers*, available in English translation in International Law Reports, Vol. 125, pp. 490-510 (Gaddafi Case).

international law and came to the conclusion that, “[i]nternational custom precludes Heads of State in office from being the subject of proceedings before the criminal courts of a foreign State, in the absence of specific provisions to the contrary binding on the parties concerned.”<sup>102</sup> This statement by the court seems quite comprehensible. However, it has been put forward that the judgment of the court implicitly admits exceptions to the jurisdictional immunity for Heads of State.<sup>103</sup> In the *Yerodia* case, Belgium argued “...immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity.”<sup>104</sup> Belgium supported this view by referring to, among other, the *Gaddafi* case. The reason for the belief that the *Gaddafi* case supports the exception to immunity is the interpretation of a sentence produced by the court. The Cour de Cassation said in its judgment: “...the alleged crime, however serious, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of State in office...”<sup>105</sup> An *e contrario* interpretation of the sentence could lead to the conclusion that there do exist exceptions to the immunity for incumbent Heads of State, given that the court said “the exceptions” and not “exceptions”, but these exceptions are not available in this particular case. If we believe that this interpretation is correct it would allow national courts to prosecute sitting Heads of State, making this case the first of its kind! Of course, this could also mean that the exception would be available also for former Heads of State and hence, limiting both the immunity *ratione personae* as well as the immunity *ratione materiae*. However, had the court really intended to make such an innovative decision, would the court then not have made its point clearer and stated some of these exceptions?

Even if we accepted this, in my opinion farfetched, interpretation it would admittedly mean that there were existing exceptions to the immunity, but the question remains for which crimes these exceptions comes into being. It is hard to see that if the exception is not available for the international crime of terrorism, as the court established in *Gaddafi*, then when is it? Naturally, one would think that such an exception should come into being for the most heinous crimes, and what crimes could be more heinous than international crimes? I think that the court should have better explained the exceptions as well as held a discussion on the type of crimes for which these exceptions would come into being. For these reasons, in my opinion, the *Gaddafi* case cannot be used as evidence of a customary rule allowing any exceptions to the Head of State immunity.

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<sup>102</sup> Gaddafi Case p. 509.

<sup>103</sup> See Zappalà p. 601.

<sup>104</sup> Yerodia Case *supra* note 21, para. 56.

<sup>105</sup> Gaddafi Case p. 509.

#### 4.2.1.5 Yerodia Case

The *Yerodia* case relates to incumbent Foreign Ministers, and here the International Court of Justice considered the protection given to them absolute. According to the ICJ in paragraph 54 of the judgment, "...the functions of a Minister for Foreign Affairs are such that, throughout 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." Moreover, the court said that, after examining State practice, it could not find any exception to this rule even for international crimes.<sup>106</sup> The ICJ was criticized for not presenting enough evidence of the customary international law rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs in the form of State practice and *opinio juris*. One voice among many other, Wouters, says that, "[i]t is remarkable that, although the Court refers to customary international law, it does not bother to establish proof of *opinio juris* and state practice, two essential components of a rule of customary law."<sup>107</sup> One can ask if it really should be necessary for the ICJ to illustrate evidence of an already generally accepted customary rule, such as the one at issue here. Wouters himself agrees to the fact that it is generally accepted that Ministers for Foreign Affairs must be awarded immunity *ratione materiae* for all acts they perform in their official functions, but he withholds that the ICJ was wrong when it extended the immunity to private acts.<sup>108</sup> It is obvious that the issuance of an arrest warrant against a Minister for Foreign Affairs will create vast problems for him in the performance of his functions. Since the immunity is accorded to Ministers for Foreign Affairs on a functional basis, it is only reasonable that the immunity have to extend to private visits as well. It is true that it would have been better had the court made a more thorough analysis of State practice and *opinio juris*, but to be honest; it would not have made any difference to the end result.

#### 4.2.1.6 Sharon Case

In June 2001, 23 survivors of the 1982 "December killings", in the Sabra and Chatila Palestinian refugee camps in Beirut, where between 700 to 3500 civilians were massacred, filed a complaint alleging that, the then Minister of Defence and current Head of Government of Israel, Ariel Sharon was responsible for war crimes, crimes against humanity and genocide in connection to the killings.<sup>109</sup> An official Israeli commission of inquiry

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<sup>106</sup> Yerodia Case *supra* note 21, para. 58.

<sup>107</sup> Wouters p. 256.

<sup>108</sup> *Ibid.* p. 256-257.

<sup>109</sup> Court of Cassation of Belgium: Decision related to the indictment of Ariel Sharon, Amos Yaron and Others. An English translation of the complaint is available in International Legal Materials, Vol. 42, pp. 596-600, 2003 (Sharon Case).

named Sharon as one of the persons responsible for the massacre.<sup>110</sup> A criminal investigation of the 1982 killings was opened in July 2001, by the investigating magistrate. In June 2002, the Cour d'Appel de Bruxelles (Brussels Court of Appeal) dismissed the claim in the *Sharon* case because it did not recognize universal jurisdiction *in absentia* and hence required that Sharon had to be present on Belgian territory in order for an investigation and trial to go forward.<sup>111</sup> In February 2003, the Belgian Cour de Cassation (Supreme Court) overturned the ruling made by the Cour d'Appel and said that the fact that the perpetrator was not present in the territory did not hinder the trial from going forward. The Cour de Cassation thus ruled in favour of universal jurisdiction *in absentia*. This did not mean, though, that criminal prosecution was possible against Sharon since the Cour de Cassation said that, "...[w]hereas, customary international law opposes the idea that heads of State and heads of government may be the subject of prosecutions before criminal tribunals in a foreign State, in the absence of contrary provisions of international law obliging the States concerned...".<sup>112</sup> The court also stated that it had not been able to find, in international conventions, any exception to this immunity for international crimes.<sup>113</sup> While the *Sharon* case was still pending, the International Court of Justice delivered its decision in the *Yerodia* case. This of course had implications for the *Sharon* case. Wouters asserts that the Cour de Cassation in its ruling relied on the ICJ's decision in the *Yerodia* case and that it interpreted its domestic law in conformity with the rule in customary international law.<sup>114</sup>

The *Sharon* case supports the finding that procedural immunity bars acting Heads of State from becoming the object of prosecution in front of national courts. The court's ruling has, nevertheless, been interpreted as clearing the way for Sharon to be tried once he ceases to hold office, regardless of whether he is present in Belgium or not. Yang declares for instance, "...the moment Sharon should become unprotected by an official position, he would face prosecution in Belgium."<sup>115</sup> I am of the belief that the Belgian court simply gave its statement concerning the status of incumbent Heads of State but remained silent on the subject of the immunity available to former Heads of State. It is true that the procedural immunity will only protect a person while he remains in office, but the substantive immunity will prevail for all acts taken in office in an official capacity. It remains unsettled what the court intended to declare regarding the substantive immunity, but in my opinion, interpreting the court's statement as support for the position that former Heads of State can be prosecuted once they leave office, would be to take the matter too far.

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<sup>110</sup> Brody, *An unfinished Assignment for Israelis*, available on <http://www.hrw.org/editorials/2003/isrl022103.htm>. Last accessed 13 May 2005.

<sup>111</sup> Yang p. 363.

<sup>112</sup> Sharon Case p. 599.

<sup>113</sup> Mallat, Verhaeghe, Walley, King-Irani, *The 12 February 2003 Decision of the Belgian Supreme Court Explained*, available at <http://www.indictsharon.net/>. Last accessed 13 May 2005.

<sup>114</sup> Wouters p. 266.

<sup>115</sup> Yang p. 364.

## 4.2.2 Immunity Ratione Materiae

### 4.2.2.1 Pinochet Case

The arrest of Augusto Pinochet in London 1998 made headlines all over the world.<sup>116</sup> It was the first time a former Head of State of a foreign country was tried in a national court for acts of torture allegedly committed on post. The case concerned a request by Spain for the extradition of the former president of Chile, Augusto Pinochet, who was temporarily in the United Kingdom undergoing medical treatment. The extradition was based on charges against Pinochet for widespread use of torture during his period of government in Chile.<sup>117</sup> Pinochet and other senior officers of the Chilean Army staged a coup on 11 September 1973 in which the President of Chile, Salvador Allende, died. Immediately after the coup, a military junta headed by Pinochet assumed power in Chile. In 1974, Pinochet declared himself Head of State of Chile and was installed as President. During the period of military rule, from 1973 to 1990, several opponents of the government were allegedly, detained without trials, tortured and killed in Chile as well as outside the country.<sup>118</sup>

On 25 November 1998, a 3-2 majority of the Lords of Appeal at the House of Lords decided that Pinochet could not claim immunity from arrest in England.<sup>119</sup> The majority of the Lords decided in this judgment that former Heads of State were entitled to immunity, according to English Law, only for acts performed in the exercise of the functions as Head of State and that torture and hostage-taking could not be regarded as falling within these functions.<sup>120</sup> This decision, however, was later overruled in another decision.<sup>121</sup> The reason for the dismissal was that the House of Lords could conclude that one of the lords, Lord Hoffmann, who had cast the decisive vote in the first decision, was the director and Chairman of a company

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<sup>116</sup> I have chosen to review only the last judgment given by the House of Lords concerning Pinochet (*Pinochet* No. 3). The reason for this is that the decision rendered by the Divisional Court from October 1998 was successfully appealed to the House of Lords. Here, the first decision given by the House of Lords was overruled since one of the law lords, Lord Hoffmann, was involved with one of the intervening parts in the case, Amnesty International. A rehearing of the appeal with other participating law lords was therefore ordered and it is this decision I refer to in the thesis.

<sup>117</sup> Introductory Note to the Pinochet Cases, *International Law Reports*, Vol. 119 p. 1.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Regina v. Bow Street Metropolitan Stipendiary*, ex parte *Pinochet Ugarte* (No. 1), England, House of Lords, 25 November 1998, available in *International Law Reports*, Vol. 119, pp. 50-107.

<sup>120</sup> Introductory Note to the Pinochet Cases, *International Law Reports*, Vol. 119, p. 4.

<sup>121</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte* (No. 2), England, House of Lords, 15 January 1999, available in *International Law Reports*, Vol. 119, pp. 112-135.

controlled by the Amnesty International, an intervening part in the first decision.

The House of Lords, now consisting of seven law lords, finally decided the famous *Pinochet* case in 1999 (No. 3).<sup>122</sup> The House of Lords had to consider whether Pinochet could resist extradition by relying on his immunity *ratione materiae*, notwithstanding that, he no longer was in office. The case is somewhat confusing and difficult to comprehend since all of the seven law lords delivered their own individual judgment. Conclusively, the House of Lords decided with a majority of six against one that Pinochet was not immune for acts of torture and conspiracy to torture, where the alleged acts took place after Chile, Spain and the United Kingdom had become parties to the Convention against Torture, 1984.<sup>123</sup>

Many people have applauded this reasoning and claimed it to be a milestone in international law, and at a first look, a 6-1 majority in favour of denial of immunity for the crime of torture certainly does imply a huge victory for human rights. After a closer look at the judgment, I cannot share this enthusiasm. The decision reached by the majority of the House of Lords is worth an ovation, the reasoning, however, is not. Some of the law lords, Lord Browne-Wilkinson, Lord Hutton and Lord Phillips, claimed the actions taken by Pinochet to be actions performed outside his official functions. It is not evident if the law lords by this intended to imply that the actions instead were taken in a private capacity. Either way, this kind of reasoning is erroneous because had Pinochet acted outside his official functions, the immunity *ratione materiae* would not have come into question at all, since this immunity is linked to the official character of the act. Half of the law lords, Lord Hope, Lord Saville, Lord Goff and Lord Millet, found that the actions taken by Pinochet were made by him in his official capacity and therefore *prima facie* entitled to immunity *ratione materiae*. Lord Saville and Lord Hope found the way to removal of immunity by denying it on the terms of the Torture Convention. All the same, denying immunity on account of the CAT can only set a precedence for cases of torture under the said convention. For that reason, this elucidation has no value for a discussion of customary law. Lord Millet kept an argument that was linked to the Torture Convention, but he did not deny immunity based on the CAT, since Chile's ratification to the CAT could not be seen as a waiver of immunity because "[i]n my opinion there was no immunity to be waived."<sup>124</sup> Instead, Lord Millet denied immunity *ratione materiae* for Pinochet because he believed the immunity to be limited in international customary international law, which provided for universal jurisdiction over the acts in question.<sup>125</sup> Lord Goff, the dissenter, concluded

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<sup>122</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), England, House of Lords, 24 March 1999, available in *International Law Reports*, Vol. 119, pp. 135-252 (Pinochet Case).

<sup>123</sup> Pinochet Case p. 137. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, United Nations, *Treaty Series*, vol. 1465, p. 85. The Convention entered into force 26 June 1987.

<sup>124</sup> Pinochet Case, p. 232.

<sup>125</sup> *Ibid.*

that Pinochet had taken the actions in his official capacity and since he could find no express removal of immunity in the CAT or any other place, he said "...Senator Pinochet is entitled to the benefit of state immunity *ratione materiae* as a former head of state."<sup>126</sup>

Conclusively, only one out of seven law lords denied immunity *ratione materiae* for Pinochet because of a belief that customary international law provided this limitation of immunity. Compared to the first (and overruled) decision by the House of Lords, the decision is more limited. In the first ruling, a more general exception to immunity for international crimes were granted by simply not including the committing of international crimes under the functions of a Head of State.

I want to propose the argument that since the judges did not explicitly remove the substantive immunity because they believed themselves bound by law to do so, the case does not support the view that a customary rule lifting immunity *ratione materiae* for international crimes already exists. It is true that the outcome of the case denied Pinochet immunity from criminal jurisdiction, but it is the *reason* for denying him immunity that will prevail. In this case, the reasons for denying Pinochet immunity *ratione materiae* were based either on the terms of the CAT or on the belief that the actions taken by Pinochet were of such a character that they never could have been taken in an official capacity. When just one of the law lords claimed denial of immunity based on rules in customary international law, the judgment carries little evidence of containing *opinio juris*. The judgment shows very clearly that there is no agreement between the judges on the point of customary law. Wirth is one of many legal scholars who are of a different opinion. Wirth claims that the *Pinochet* case is evidence of State practise limiting immunity for former Heads of State, and not just for the crime of torture but also for all international crimes.<sup>127</sup>

Bianchi is of the impression that the *Pinochet* case will be of great importance for international law.<sup>128</sup> All the same, there is more justification to the idea that this case is of limited precedence outside the United Kingdom. The case is partly reflecting special British judicial circumstances and the question of extradition was limited to crimes according to the Torture Convention. The question of United Kingdoms accession to the Torture Convention was given a great emphasis, and the extradition question did not get the equal amount of space. In addition, the divergence of the law lords legal arguments and conclusions will make this case less

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<sup>126</sup> *Ibid.* p. 176 and Barker p. 947.

<sup>127</sup> Wirth 2001 p. 437. Wirth is of the belief that it is the opinions of four law lords (who share his argument) that should be taken into account in determining State practise and *opinio juris*. Wirth puts forward, "[i]n the light of these conclusions the House of Lords' denial of immunity for Pinochet must be understood as state practise of the United Kingdom confirming the international norm that immunity *ratione materiae* is not available for any prosecution regarding core crimes; *i.e.*, the scope of the decision as state practise and *opinio juris* for the purpose of determining customary international law is not limited to cases under the *Torture Convention*, but comprises all core crimes."

<sup>128</sup> Bianchi 1999 p. 248.



authoritative – the outcome of the case is the only common denominator of the majority judgment. Therefore, the precedence of this case has to be limited.<sup>129</sup> Worth mentioning is that the former British Home Secretary Jack Straw ruled that Pinochet would not be extradited to Spain after all, this due to Pinochet's poor medical condition.

#### 4.2.2.2 Hissène Habré Case

Hissène Habré was the President of Chad from 1982 until he was overthrown by a coup in 1990. Habré sought refuge in Senegal after the coup and has since then continued living there in exile. In 1992, a Truth Commission in Chad alleged that during Habré's ruling, the regime had engaged in systematic torture and there had been tens of thousands of political murders. It was estimated that Habré is responsible for the death and torture of some 40,000 individuals.<sup>130</sup> Since Habré's fall, Chadians had been trying to bring him to justice. In 2000, complaints against Habré were lodged in Dakar, Senegal by a number of people alleging that they were the victims of torture and crimes against humanity, in which Habré was implicated. An indictment was issued against the former President and he was put under house arrest.<sup>131</sup> This was the first time an African had been charged with atrocities by the court of another African country. The former President of Senegal, Abdoul Diouf, was supportive of the prosecution and the State prosecutor had given his formal approval to it.<sup>132</sup> Habré appealed against the institution of proceedings on the ground that the Senegalese courts lacked jurisdiction to try the case since the alleged offences had been committed against foreigners abroad. After the newly instated president of Senegal, Abdoulaye Wade, had declared that Habré was not to be tried in Senegal, the prosecutor's office unfortunately reversed its position and joined in to dismiss the case on lack of jurisdiction.<sup>133</sup> On July 4, 2000, the Senegalese Cour de Cassation (Supreme Court) dismissed the case on the ground that the court lacked jurisdiction over the case and stated that the mere fact the Habré was present on Senegalese soil did not justify the prosecution against him.<sup>134</sup> The victims and NGO's did not want to stop here and give up their chance to justice, but prosecuting Habré in Chad seemed fruitless since it was widely known that President Deby and several State Officials had taken part in the atrocities committed by Habré.<sup>135</sup> Instead, proceedings were instituted against Habré before a Belgian Examining Magistrate, who had visited Chad in February 2002 as part of his

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<sup>129</sup> Lindholm p. 188.

<sup>130</sup> Sharp p. 165.

<sup>131</sup> *Hissène Habré case*, Arrêt n' 14 du 20-3-2001 Pénal, Décision de la Cour de Cassation du Sénégal, an English translation of the judgment is available in *International Law Reports*, Vol. 125, pp. 569-580 (Hissène Habré Case).

<sup>132</sup> Sharp p. 169.

<sup>133</sup> *The Case against Hissène Habré, an "African Pinochet"*, available at [http://www.hrw.org/justice/habre/intro\\_web2.htm](http://www.hrw.org/justice/habre/intro_web2.htm). Last accessed 13 May 2005.

<sup>134</sup> Hissène Habré Case, p. 577-578+579.

<sup>135</sup> Sharp p. 170.

investigation.<sup>136</sup> Even though the Belgian universal jurisdiction law was restricted through an amendment in 2003, this did not affect the Habré case because it concerned Belgian citizen plaintiffs and the investigation had already begun.<sup>137</sup> As of today, the case has not yet been brought to trial in Belgium.

The case concerns a former Head of State facing prosecution in a foreign country because of his alleged involvement in international crimes and for this reason; the case is of interest for this thesis. In view of the fact, however, that the Senegalese court dismissed the *Hissène Habré* case on its lack of jurisdictional basis and as a result never had a chance to examine the immunity question, the case will be of less precedence in the immunity context, since a precondition for immunity is the establishment of jurisdiction. Nevertheless, (and especially since there is a shortage of judgments from national courts concerning former Heads of State charged with international crimes) the case could be used as an illustrative example of a country's refusal to prosecute a foreign Head of State. After all, the most important component for a successful prosecution of a Head of State accused of international crimes is the foreign State's political will to go forward with a trial. Without this political will, and the possibility to use the international tribunals, there is no hope of getting the alleged perpetrators convicted.

#### 4.2.2.3 Bouterse Case

The Amsterdam Court of Appeal delivered its ruling in the *Bouterse* case in November 2000.<sup>138</sup> (The case later appeared before the Supreme Court but this court never addressed the issue of Bouterse's immunity and therefore the decision of the Amsterdam Court of Appeal on immunity stands intact). Allegations were brought against Desiré Delani Bouterse, then Head of State in Surinam, for the involvement in the killing of a number of his political opponents in December 1982 in Surinam. On that day, 15 persons were arrested by the Surinam military authority under the command of Bouterse and held in Fort Zeelandia in Paramaribo. The arrested persons comprised prominent persons in Surinam who were seen to pose a threat to the military authority under Bouterse. Evidence showed that the arrested men had been tortured before being summarily and arbitrarily executed by

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<sup>136</sup> Hissène Habré Case p. 579-580.

<sup>137</sup> See article 5 of Belgium's Amendment to the Law of June 15, 1993 (as amended by the law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law. An English translation of the amendment is available in ILM, Vol. 42, p. 749, 2003.

<sup>138</sup> R. Wijngaarde and R.A. Hoost, Court of Appeal of Amsterdam, 20 November 2000, NJ (2001) No. 51, available in English translation in *Netherlands Yearbook of International Law*, vol. XXXII, pp. 266-282 (Bouterse Case).

the military on Bouterse's order.<sup>139</sup> The court concluded that prosecution could go forward against Bouterse for the international crime of torture based on universal jurisdiction. The fact that Bouterse was not present on Dutch territory did not present any obstacles for the court who said that customary international law did not prohibit the prosecution of Bouterse *in absentia*.<sup>140</sup> Bouterse's counsel had submitted that at the time of the alleged commission of the killings, Bouterse was Head of State and, as such, enjoyed immunity in Dutch courts. The court replied to this, "[t]he Court of Appeal need not consider whether this insufficiently argued submission concerning the position of Bouterse is correct. This is because the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State."<sup>141</sup> Hence, the court concluded that the ordering of the killings could not qualify as official acts and that therefore they could not accord immunity. The Amsterdam Court of Appeal thus took the same view as half of the law lords judging the *Pinochet* case, namely that certain acts are so terrible that they cannot be regarded as part of the functions of a Head of State.

Zegveld criticizes the Amsterdam Court of Appeal for using the category of "official" and "non-official" acts, claiming that only very few acts could be qualified as private and hence therefore not be given immunity. In her view, the December killings were carried out by the military on Bouterse's order, and no order from a Head of State in a military commander capacity, could be considered "non-official".<sup>142</sup> Wirth contends that the *Bouterse* case is an example of State practise "...which supports the view that there are exceptions to state immunity."<sup>143</sup> Hence, the *Bouterse* case has been seen as evidence of State practise limiting immunity for former Heads of State allegedly committing international crimes. The limitation of immunity on the ground that the acts committed never could be considered as functions of a Head of State and therefore not been made in an official capacity is a solution adopted by the Amsterdam court that, however convenient, avoids the issue of a possible exception to immunity for international crimes. By concluding that the acts taken by Bouterse never could have been committed in an official capacity, the court made it very easy for itself, since immunity is only accorded for acts that are of an official character. Additionally, I withhold that the court's reasoning is erring because it fails to recognize that the crime charged here, the crime of torture, requires the participation of a state official or another person acting in an official capacity as an element of the crime.<sup>144</sup> Therefore, it is rather strange to claim, as the court did, that the acts cannot have been taken in an official capacity. Since the Amsterdam court did not deny Bouterse Head of State immunity on the grounds of an exception found in customary international law, I hold that it is not possible

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<sup>139</sup> Report of appointed expert C.J.R. Dugard, LJN AA8427, Gerechtshof Amsterdam, OPINION RE BOUTERSE, para 1.2, available in English translation at <http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp>. Last accessed 13 May 2005.

<sup>140</sup> Bouterse Case, para. 5.4, p. 278.

<sup>141</sup> *Ibid.* para. 4.2, p. 277.

<sup>142</sup> Zegveld p. 115.

<sup>143</sup> See for example Wirth 2002 p. 884.

<sup>144</sup> See CAT article 1.

to regard the case as evidence of State practise limiting the substantive immunity for a Head of State accused of international crimes.

#### 4.2.2.4 Yerodia Case

In the *Yerodia* case, the International Court of Justice was to deliver a judgement merely on the question of incumbent Foreign Ministers. However, the court did elaborate on the subject of former Foreign Ministers in an *obiter dictum*. The *obiter dictum* stated that a former Foreign Minister could only be tried for acts taken in a private capacity committed prior or during the period of office.<sup>145</sup> If we give weight to the ICJ's *obiter dictum*, former Foreign Ministers enjoy immunity for all official acts taken during the duration of office.<sup>146</sup> Wouters held with reference to the *Yerodia* case that "...the Court's view could confront us with the peculiar and unacceptable fact that precisely the most serious crimes would not be subject to prosecution even after a person has ceased to hold office, and that immunity would indeed lead to impunity."<sup>147</sup> This statement is just one example of how legal commentators use moral arguments as motives for why an exception to immunity should be legitimate. No matter how unacceptable Wouters thinks that the statement is, it is the ruling delivered by the International Court. It can be argued that as an *obiter dictum* it should not be taken too seriously. All the same, the *obiter dictum* is the International Court's evaluation of the legal position. Taken together with all the attention the judgment has received, it is safe to say that it has a deep impact on international law. The ICJ's decision has been seen as a major setback in the fight against impunity but in one sense, the ICJ's decision cannot be seen as a setback, since it could be argued that it is in line with preceding state practise.

### 4.3 The Evolvment of a New Customary Rule

As mentioned above, several writers have suggested that in the case of perpetration of international crimes, the person responsible should not be able to invoke his right to immunity. This exception from immunity for international crimes is claimed to have its foundation in customary international law.<sup>148</sup> In order to examine the possible existence of such a new customary rule we have to look at how custom is created. Custom is one of the sources of public international law. Article 38 (1) (b) of the Statute of the International Court of Justice informs that the Court, when

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<sup>145</sup> Yerodia Case *supra* note 21, para. 61.

<sup>146</sup> Even if many writers in the legal doctrine do not agree with the ICJ on its view of the current state of law on immunity for Ministers for Foreign Affairs, they seem to have given weight to the reasoning of the ICJ in its *obiter dictum*.

<sup>147</sup> Wouters p. 262.

<sup>148</sup> See section 4, *supra* note 39.

ruling, shall apply international custom as evidence of a general practise accepted as law. Custom is based upon two elements. The objective element, State practise, means an established widespread and consistent practise on the part of States. The objective element has to be combined with the subjective element, *opinio juris*, which is based upon a belief by States that they act in a certain way because they are bound to do so by law. This was expressed by the ICJ in the *North Sea Continental Shelf* case, where the court made an analysis that is applicable to all creation of custom.<sup>149</sup>

Not only must the acts concerned amount to a settled practise, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practise is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.<sup>150</sup>

Judicial decisions of national courts can be regarded as State practise.<sup>151</sup> For example, the International Law Commission always treat national judgments as primary evidence of State practise.<sup>152</sup> According to Wirth, judgments from these courts must be regarded as manifestations of *opinio juris*.<sup>153</sup> Bianchi asserts that “[f]ew, if any, doctrines of public international law have been more affected by the case law of domestic courts than state immunity.”<sup>154</sup> With no doubt, the case law from national courts will contribute to the verification of State practise.

### 4.3.1 Arguments Raised in International Case Law

The answer to the question if there has evolved a new customary international rule removing Head of State immunity regarding international crimes cannot be found in just a single answer. I contend that it is not possible (as so many writers, in the literature I have come across writing this thesis, like to believe) to conclude that the same customary rule has evolved for the international tribunals and the national courts. The reason for my conclusion that it is impossible to say that the same customary rule has evolved for international tribunals and national courts is, that in one situation States explicitly have given up a part of their sovereignty and in the other situation, they have not. In front of international tribunals established through Security Council resolutions, such as the ICTY and ICTR, all members of the UN have automatically waived their immunity. The International Criminal Court was established through a treaty, and all

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<sup>149</sup> *North Sea Continental Shelf*, 1969, ICJ Reports, p. 44.

<sup>150</sup> *Ibid.* p. 44, para. 77.

<sup>151</sup> Akehurst p. 10.

<sup>152</sup> Report of the International Law Commission to the General Assembly, *Yearbook of the International Law Commission* (1950), vol. 2, pp. 370.

<sup>153</sup> Wirth 2001 p. 434.

<sup>154</sup> Bianchi 1994 p. 195.

the member States to this treaty have agreed to limit the immunity for defendants. No such waiver, *ante hoc*, of immunity has been expressed when it comes to a State national facing proceedings in a foreign State. For that reason, the question if immunity can be lifted regarding international crimes has to be answered differently depending on what type of jurisdiction we are discussing. Maintaining the opposite is not sustainable. The ICJ is supporting this idea in the *Yerodia* judgment where it says that the rules concerning the immunity of persons in an official position contained in the instruments creating international criminal tribunals only apply to such tribunals.<sup>155</sup> Theoretically, it is possible to regard treaties as State practise but this only if a quantity of States makes it a habit to conclude treaties that contain certain standard provisions, and it is possible to show that they do this because they recognize the existence of a custom requiring them to do so. It can also be argued however, that the very fact that States have recourse to treaties to establish certain rules shows that they consider the treaty necessary to establish those rules and hence, that there is no customary rule of the nature.<sup>156</sup> Hence, it is not possible to draw the conclusion that any exceptions to immunity found in the practise of international tribunals will be available in regard to the proceedings in national courts.

Cassese believes that State practise from national courts verifies the evolvement of a new customary rule and claims that the charters of the various international tribunals represent the origin to the alleged customary rule.<sup>157</sup> I cannot agree with him on this matter. As I mentioned above, I am of the belief that the case law of the international tribunals must be separated from the case law of the national courts because the courts establish their jurisdiction differently. Since the international treaties that form the Statutes of these international tribunals are binding upon States because States have ratified them, they do not say anything about customary international law. The practise resulting from these tribunals can only set a precedent for those States who have ratified the treaties constituting these tribunals. Cassese also refers to the practise from national military courts, where military officers stand trial, as confirmation of the new customary rule.<sup>158</sup> The practise from these courts can, as a consequence of the courts limited jurisdiction, only set a precedence for military officers in front of military courts. As a result, this practise is of no use in this context. Concerning the conclusions that can be drawn from the practise of the international tribunals there is no doubt that, immunity *ratione materiae* has been and can be limited. The whole *raison d'être* for these tribunals is to make the prosecution of individuals responsible of grave crimes possible. Proceedings against perpetrators of international crimes have been conducted from the beginning of Nuremberg and then forward with the ICTY and ICTR and they will continue to be brought against such persons on a permanent basis with the newly established ICC.

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<sup>155</sup> Yerodia Case *supra* note 21, para. 58.

<sup>156</sup> Thirlway p. 134.

<sup>157</sup> Cassese 2002 p. 864-865.

<sup>158</sup> Cassese 2002 p. 870-871.

Defenders of the supposedly new customary international law rule like to refer to cases like *Pinochet* and *Bouterse* in order to prove their point, because in these judgments the claim to Head of State immunity was unsuccessful. I am of the belief that the conclusions drawn from these two judgments are inaccurate and that the referred cases cannot be used as evidence pointing in the direction of a new customary rule. It is true that in both of the judgments mentioned, the right to Head of State immunity was denied for the alleged committing of international crimes. However, the national courts denied the right to immunity either on conventional grounds or by stating that international crimes cannot be committed in an official capacity. For this reason, the two cases cannot be used as evidence supporting a new customary rule with the proposed content. The essential element that these scholars, such as Cassese, Wirth, Bianchi and Zappalà, fail to show evidence of when they discuss the *Pinochet* and *Bouterse* cases, is the important proof of *opinio juris* - meaning the belief that you act in a certain way because you are bound by a rule of law to do so. Practise on its own cannot create a rule of customary law; it has to be coupled with evidence of *opinio juris*.<sup>159</sup> In the *Bouterse* and *Pinochet* cases, the reason for denying Head of State immunity was not based upon a customary international law rule providing this exception to immunity instead other grounds were found. Therefore, the cases contain no evidence of the essential *opinio juris*. Hence, the referred cases cannot be used as evidence creating a new customary rule.

In this thesis, I have discussed eight national court cases; only in two of them (*Pinochet* and *Bouterse*) have the immunity from jurisdiction for a Head of State been explicitly limited. Statements in other judgments, however, can be understood as implicitly allowing the limitation of Head of State immunity. For instance, in the *Fidel Castro* case, which dealt with an incumbent Head of State, the Spanish court held that as long as Castro remained in office, he could not be prosecuted in Spain.<sup>160</sup> It is not completely clear what the Spanish court's statement suggests, does it imply that as soon as Castro steps out of office a prosecution in Spain could go forward? I am not convinced that the statement support such an interpretation. Since the ruling of the court does not mention the conditions for such a prosecution to go forward, it makes it less persuasive. The ruling by the Belgian court in the *Sharon* case, which also concerned a sitting Head of State, has been interpreted as clearing the way for Sharon to be tried once he ceases to hold office.<sup>161</sup> Here, the court relied on ICJ's ruling in the *Yerodia* case and stated that the immunity found in international custom bars incumbent Heads of State from becoming the object of proceedings before criminal tribunals of foreign States.<sup>162</sup> In its decision, the court, however, never gave its opinion on the question of what immunity that can be accorded to former Heads of State. Consequently, I believe that

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<sup>159</sup> Akehurst p. 31.

<sup>160</sup> Cassese 2002 p. 861.

<sup>161</sup> Yang p. 364.

<sup>162</sup> Sharon Case *supra* note 109 p. 599.

it is impossible to infer, from the Belgian court's statement, the possibility to limit immunity *ratione materiae* for former Heads of State suspected of international crimes.

Even if the *Pinochet* and *Bouterse* cases mentioned above would be seen as proof of State practise showing evidence of *opinio juris* and the *Sharon* and *Fidel Castro* cases as implying the same, this would still not be sufficient to establish a rule of customary law. It has not been established in international law how many judgments from national courts it takes to form the relevant practise, but it must be considered evident that these decisions cannot be sufficient. State practise, as it stands today, is too insignificant and therefore, even if we assume *opinio juris*, cannot establish a new customary rule. Some writers have declared that the ICJ's decision in the *Yerodia* case was erroneous because it failed to refer to this allegedly new customary rule.<sup>163</sup> Nevertheless, after the *Yerodia* case there can be no doubt that it is not yet possible to limit the immunity for former Heads of State even if they have committed international crimes.

Voices have been raised for the claim that it also should be possible to limit the procedural immunity when it comes to international crimes. Bianchi is of the opinion that "[t]he alleged commission of international law crimes should also dispose of a claim of immunity *ratione personae*."<sup>164</sup> This limitation would have the implication that it moreover would be possible to prosecute incumbent Heads of States. An examination of the practise from the various international tribunals reveals that there has only been one case so far, the *Milosevic* case in front of the ICTY, where the immunity *ratione personae* was limited and the prosecution against a sitting Head of State allowed. The Rome Statute of the International Criminal Court will however provide a future possibility to prosecute incumbent Heads of State.<sup>165</sup> The implication in the *Milosevic* case taken together with the future jurisdiction of the ICC can be regarded as evidence of a new trend providing for limitation of the procedural immunity in front of international tribunals.

If the alleged new customary law rule does exist, would it then also dispose of the immunity *ratione personae* and thus make an exception in the immunity for incumbent Heads of State, as claimed by Bianchi? Well, the case law from the national courts examined in this thesis is quite unambiguous concerning immunity *ratione personae*. I have not been able to find a single case so far where a Head of State in office has been prosecuted in front of a foreign court. In the *Gaddafi* case, decided by the Cour de Cassation in France, the court said that the crime concerned did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of State in office.<sup>166</sup> This statement has been understood by some legal writers to imply the possible limitation of immunity *ratione personae* for Heads of State in office. According to me, it

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<sup>163</sup> See for example Cassese 2002 p. 870.

<sup>164</sup> Bianchi 1999 p. 261.

<sup>165</sup> See article 27 (2) of the Rome Statute.

<sup>166</sup> *Gaddafi* Case *supra* note 101, p. 509.



can be argued that it was not the intention of the court to make such a groundbreaking statement. My argument rests on the vagueness of the sentence in question, and the fact that neither any examples of the nature of the exceptions were given, nor any explanation of the crimes that would bring the exception into life. Moreover, the ICJ's decision in the *Yerodia* case, where the court explicitly said that there is no existence of a customary rule lifting immunity from criminal jurisdiction for incumbent Foreign Ministers accused of international crimes, leaves no room for any doubts. My conclusion for the immunity *ratione personae* is that it will protect its holder from national court proceedings but not necessarily from proceedings in international tribunals.

### 4.3.2 Arguments Voiced in the Legal Literature

Other arguments have been raised for the proposition that there exists an exception to the Head of State immunity, which comes into life for international crimes. An argument put forward is that the principle of immunity is incompatible with the concept of fundamental human rights, and therefore it would be wrong of the international community to grant immunity in relation to acts that it condemns as criminal and as an attack on the interests of the international community as a whole.<sup>167</sup> It is true that the granting of immunity to a Head of State accused of committing international crimes seems to be at odds with a country trying to maintain its fundamental human rights standard. A *jus cogens* norm is a norm recognized and accepted by the international community of States as a norm from which no derogation is permitted.<sup>168</sup> Bianchi keeps a hierarchy of rules argument when he contends that if international crimes are *jus cogens* norms it is difficult to argue that immunity can coexist with them. He continues "...since *jus cogens* norms enjoy the highest status within international law, they prevail and invalidate other rules of international law."<sup>169</sup> (This of course presumes that the principle of immunity does not attain the same high status as international crimes). However, according to McLachlan, "[t]he proposition that the *jus cogens* or *erga omnes* nature of international crimes supplies the answer does not take the matter further."<sup>170</sup> The reason for this, according to McLachlan, is the fact that it is necessary to separate the different principles from each other. He refers to the *East Timor case* where the ICJ held "...the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."<sup>171</sup> On the subject of State immunity, Bartsch and Elderling held that, if a norm of *jus cogens* standard prohibits a certain conduct such as war crimes "...this same rule still does not bar states from relying on state immunity before national courts in cases concerning war crimes, since state immunity only concerns the enforcement,

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<sup>167</sup> Bianchi 1999 p. 260-261.

<sup>168</sup> Compare the Vienna Convention on the Law of Treaties, article 53.

<sup>169</sup> Bianchi 1999 p. 265.

<sup>170</sup> McLachlan p. 963.

<sup>171</sup> East Timor Case (*Portugal v. Australia*), 1995, ICJ Reports, p. 90, para. 29.

not the material content of the *jus cogens* rule.”<sup>172</sup> Admittedly, this declaration concerned State, and not personal, immunity but the arguments concerning *jus cogens* are still valid. Finally, the fact that an international crime is considered to be of a *jus cogens* character does not actually have anything to do with this discussion on immunity since, in the end, it is up to States to decide if they will go forward with a prosecution against a foreign Head of State, and the only thing needed for this is the political will to do so.

Another argument put forward as proof of a new rule is the UN General Assembly Resolution 1/95 from 1946, where the GA affirmed the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.<sup>173</sup> The General Assembly’s affirmation of the Nuremberg principles will only carry with it the effect of being evidence that the Nuremberg Tribunal acts as a precedent for the more newly established international tribunals. Therefore, neither this fact can be used as proof of the new rule.

Zappalà asserts that the ILC Draft Code of Crimes against the Peace and Security of Mankind, which has been interpreted as limiting both procedural and substantive immunity, serves as confirmation of a new rule in customary law limiting immunity for Heads of State with reference to international crimes. This argument is even more convincing after the GA expressed its appreciation to the ILC for the completion of the Draft Code in its resolution 51/160 in 1996.<sup>174</sup> It is, however, first when the Code of Crimes against the Peace and Security of Mankind is completed as a treaty and States have ratified it, that it can become legally binding. A possibility is of course that the Draft Code turns into customary international law.

Furthermore, the coming into being of the Rome Statute of the International Criminal Court in 2002 will not present any answers. It is true that the Statute contains an express provision that no claim of immunity will be possible before the ICC.<sup>175</sup> This is true for the individual in front of an international tribunal, but it says nothing of the way a national court will deal with personal immunities. According to article 1 of the Rome Statute, the ICC only exercises jurisdiction in those cases where an appropriate national court cannot or will not proceed with a prosecution. This is the so-called principle of complementarity, which allows the national courts to deal with the matter first. In addition, a non-party State involved in a case brought in front of the ICC could argue that the provisions removing immunity embedded in the Rome Statute only apply to contracting States and as a third State, these provisions will not bind them.

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<sup>172</sup> Bartsch, Elderling p. 484.

<sup>173</sup> A/RES/1/95, 11 December 1946 and Cassese 2002 p. 872.

<sup>174</sup> Zappalà p. 602, note 45.

<sup>175</sup> The Rome Statute of the International Criminal Court, article 27.

### 4.3.3 Conclusions

The main rule is that incumbent Heads of State enjoy absolute immunity *ratione personae* for all acts taken before and during office and former Heads of State enjoy immunity *ratione materiae* for the acts taken in office that are of an official capacity. It is a general principle in law that anyone who wants to rely on a rule in customary international law will have to carry the burden of proving that the relevant State practise and *opinio juris* exist.<sup>176</sup> Here, clearly, the burden of proof lies on the persons claiming the existence of a new rule that limits Head of State immunity for international crimes. It is not enough that legal commentators seem to agree on the evolvment of a new customary rule, if no compelling evidence of such a rule exists.<sup>177</sup> I have not been able to find any convincing evidence in the international case law nor any valid arguments in the legal literature that proves the existence of a new customary law rule. When Cassese holds that the ICJ failed to apply or refer to the customary rule lifting substantive immunities for international crimes allegedly committed by State agents that come into being as soon as the rules on procedural immunities are no longer applicable, he refers to the rule, as if it already existed.<sup>178</sup> Since furthermore, the International Court of Justice denies in its *Yerodia* ruling any finding of the existence of such a rule, it is unproblematic to draw the conclusion that the rule has never existed other than in some legal scholars minds. No matter how appalling it may sound that those persons allegedly committing heinous crimes instead of being prosecuted, should go free, the current state of law makes it impossible to claim a new rule allowing the limitation of immunity. The question whether it in customary international law has been established a new rule that allows for an exception to the Head of State immunity regarding international crimes, must be answered in the negative.

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<sup>176</sup> See for instance Bernhardt p. 901.

<sup>177</sup> See Cassese 2002 on p. 873 where he tries to draw support for the new customary rule from legal commentators.

<sup>178</sup> Cassese 2002 p. 867.

## 5 Can International Crimes be Committed in a Private Capacity?

In chapter four, I have concluded that immunity for former Heads of State stays intact for acts performed while in office that are of an official character. I have also concluded that no exception in customary international law exists that would allow national courts to prosecute incumbent and former Heads of State when they are suspected of having committed international crimes. Another option is however still available for national courts wanting to try foreign Heads of State. The ICJ stated, as mentioned before, in an *obiter dictum* that a former Foreign Minister would still be immune for any official acts committed in office but that he could be tried in another State for acts committed in a private capacity.<sup>179</sup> The reasoning raises the question of what type of crimes could be committed in a private capacity. Can international crimes like genocide, torture and crimes against the humanity be regarded as committed in a private capacity (in order to bring the alleged criminal to justice) or should they always be seen as committed in an official capacity? An interesting point is that while the *Pinochet* and the *Yerodia* contains reasoning along a similar line; namely, that immunity of a former Head of State exists in respect of acts taken while in office if they are of an official character; they have two completely different outcomes regarding the awarding of immunity. The reason is the fact that the two courts have diverse opinions on the question if international crimes can be committed in a private capacity.

I would like to start with the situation where the classification of acts has been uncertain. In some of the cases in front of national courts that I have looked at, the judges have claimed that the actions taken by the Head of State were actions taken outside the Head's official functions and therefore could not be covered by the immunity *ratione materiae*. This happened for example in the *Bouterse* case where the Amsterdam Court of Appeal concluded that the killing of several political opponents were non-official acts and therefore could not be covered by immunity.<sup>180</sup> In the *Pinochet* case several of the law lords concluded that the actions taken by Pinochet were outside his official functions.<sup>181</sup> This could be interpreted so that the judges intended to label these actions to be taken in a private capacity. Either way, in my opinion, this reasoning is too fabricated and seems to have been made only in order to find a way around the question of granting immunity *ratione materiae* to former Heads of State, with the purpose of getting the alleged perpetrator convicted. I do not think the solution presented by some of the law lords is satisfactory. Admittedly, the law lords could, by

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<sup>179</sup> *Yerodia Case supra* note 21, para. 61.

<sup>180</sup> *Bouterse Case supra* note 138, para. 4.2, p. 277

<sup>181</sup> *Pinochet Case supra* note 122, see section 4.2.2.1.

concluding that the actions taken by the dictator would fall outside his official functions, make it possible for Pinochet to be extradited, but this solution does not go very well together with the fact that certain crimes (such as the crime of torture) require an official element.

ICJ's *obiter dictum* in the *Yerodia* case have been interpreted as implying that war crimes and crimes against the humanity cannot be committed in an official capacity but must be committed in a private capacity.<sup>182</sup> I have not been able to find any convincing argument in favour of this proposition. For instance, some of these international crimes engage direct involvement of the State apparatus. With reference for example to the crime of torture, it is only an official or other person acting in an official capacity that can carry out the crime.<sup>183</sup> The same is true for crimes against the humanity, which are committed as part of a governmental policy or with the consent of a government.<sup>184</sup> Here, it seems to be of no point to deny the official character of such acts.

The crimes covered in the Rome Statute of the International Criminal Court are genocide, crimes against the humanity, including torture, war crimes and crimes of aggression.<sup>185</sup> It is true as Barker argues, that had it not been possible for these crimes to be committed in an official capacity there would be no need for the specific inclusion of article 27 in the Statute, which deals with the irrelevance of official capacity.<sup>186</sup>

In addition, the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC in its second reading and by a GA resolution in 2001, article 7 state that acts committed by a State Official, who exceed his authority or contravene instructions, are considered to be acts committed in a official capacity as long as the act was done on behalf of the State.<sup>187</sup> These Articles deal only with State responsibility, which of course is a separate issue from that of the individual's responsibility, which this thesis investigates.

Another problem with defining international crimes as crimes committed in a private capacity is that it then would be impossible to attribute the act to a State. Consequently, State responsibility cannot be invoked at an

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<sup>182</sup> See for instance the Joint Separate Opinion *supra* note 32, para. 85.

<sup>183</sup> The crime of torture is defined in article 1 of the CAT to mean ...” any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>184</sup> Cassese 2003 p. 64.

<sup>185</sup> Rome Statute of the International Criminal Court articles 5-9.

<sup>186</sup> Barker p. 944.

<sup>187</sup> Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) and by the GA in A/RES/56/83, 12 December 2001.

international level. For instance, it would be impossible for a court like the European Court of Human Rights to order a State to pay damages to the victims of serious crimes. One solution put forward by Denza that would make it possible to get around this issue is to say that acts are attributable to a State and the State is responsible for the acts but in the context of potential criminal proceedings in domestic courts of other States against an individual they cannot constitute official functions.<sup>188</sup> It is, however, uncomfortable to claim that an act should be considered a State function in an international context but not in a national context; therefore, this solution has to be discarded.

At the same time, it is awkward to label international crimes as acts committed in official capacity. It seems easy to argue that the perpetration of international crimes lies outside a State's functions and is something the State cannot and should not do. Bianchi claims that it is impossible to label international crimes as official acts because a foreign State is very unlikely to have enacted legislation that will allow the State organs to violate human rights.<sup>189</sup> The law lords who gave the first decision in the *Pinochet* case (No. 1), which later was overruled due to Lord Hoffmann's ties with the intervening part Amnesty International, came to the conclusion that torture could not be considered a crime that would fall within a Head of State's official functions.<sup>190</sup> For instance, Lord Steyn maintained "...the charges brought by Spain against General Pinochet are properly to be classified as conduct falling beyond the scope of his functions as head of state."<sup>191</sup> Similarly Lord Nicholls held "...it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state."<sup>192</sup> He then announces that certain types of conduct in international law, such as torture, are not acceptable conduct of anyone, whether as head of state or other person, and therefore, he indicates, cannot be regarded as a function of a Head of State.<sup>193</sup> Lord Phillips makes the same argument when he states that he did not believe that the official functions of a Head of State could "...extend to actions that are prohibited as criminal under international law."<sup>194</sup> Nevertheless, the mere fact that an act is considered criminal under international law will not be enough to prevent persons from committing the crime. It is a fact that international crimes are committed in the world, and hence, there has to be someone who commit these crimes. The dissenting judges, Higgins, Kooijmans and Buergethal in the *Yerodia* case concluded from the legal literature that "...serious international crimes cannot 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..."<sup>195</sup> In *Pinochet*, Lord Browne-Wilkinson asked the question "[c]an it be said that the commission of a

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<sup>188</sup> Denza p. 954.

<sup>189</sup> Bianchi 1994 p. 227.

<sup>190</sup> Introductory Note to the Pinochet Cases, International Law Reports, Vol. 119, p. 4.

<sup>191</sup> Judgment *supra* note 119, p. 105.

<sup>192</sup> *Ibid.* p 98.

<sup>193</sup> *Ibid.*

<sup>194</sup> Pinochet Case *supra* note 122, p. 247.

<sup>195</sup> Joint Separate Opinion *supra* note 32, para. 85.

crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state?”<sup>196</sup> He then directly answered his own question with “I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function.”<sup>197</sup> These arguments are not that convincing though, since they overlook the reality that many international crimes for the most part are committed by, or at least with the support of, high State Officials and therefore fall within the scope of official acts. The statement made by Lord Browne-Wilkinson concerning the CAT is even more surprising because the Torture Convention contains a direct reference to the official nature of the crime of torture.<sup>198</sup>

Watts contends that a Head of State can commit crimes in his personal capacity but he continues to say that it is equally true that a Head of State can engage in criminal conduct in the course of his public functions.<sup>199</sup> The critical test, according to Watts, if a Head of State can commit international crimes in a private capacity would be “...whether the conduct was engaged in under colour of, or in ostensible exercise of, the Head of State’s public authority. If it was, it must be treated as official conduct and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State.”<sup>200</sup>

As a conclusion, I believe that it is impossible to label international crimes as acts made in a private capacity. Crimes like torture and crimes against the humanity do not fit into the category of private acts, because they contain a direct reference to the official capacity of the person committing the crime. It is also very likely that individuals commit crimes by making use of their official position. According to Cassese international crimes, “...are typically characterized by the fact that their commission cannot occur without state action or a state-favouring policy.” It appears to be of little use denying the official character of some international crimes. I am of the opinion that it is a poor solution to declare that international crimes must be outside the official functions of a Head of State, this only in order to make it possible to limit immunity and prevent the perpetrator from walking away free. If an act is not of an official character, then it has to be private, and here we are back at the starting point, can an international crime really be committed in a private capacity? National courts who want to try a former foreign Head of State still have the option to do so concerning all acts committed by the Head of State in his private capacity. The inclusion of international crimes in this private act category is however not a sustainable solution, and therefore, prosecution for these crimes is not yet possible.

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<sup>196</sup> Pinochet Case *supra* note 122, p. 155.

<sup>197</sup> *Ibid.*

<sup>198</sup> See CAT article 1.

<sup>199</sup> Watts p. 56.

<sup>200</sup> *Ibid.* p. 56-57.

## 5.1 Is the Distinction Between Private and Official Acts Necessary?

The distinction between official and private acts does not seem necessary when we talk about incumbent Heads of State. The above-mentioned case law from national courts tells us that the procedural immunity for Heads of State in office is more or less absolute. It is not necessary to distinguish between the types of acts because the official position of the alleged criminal protects him, no matter what.<sup>201</sup> The distinction seems all the more important for former Heads of State after the ICJ's judgment in the *Yerodia* case, where the court explicitly stated that a former Minister for Foreign Affairs can only be tried by a foreign court in respect of acts committed prior or during that period of office in a private capacity. Here the distinction becomes highly relevant.

It is tempting to agree with Wouters when he says that it was regrettable that the court used the ambiguous and controversial criterion of official and private acts instead of recognizing an exception to the granting of immunities to former Ministers in case of international crimes.<sup>202</sup> Instead, Wouters suggests that we compare this with the above-mentioned Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law.<sup>203</sup> The Resolution draws a distinction between serving Heads of State and former Heads of State in respect of immunities for international crimes and does not trouble itself with making a distinction between private and official acts. By removing the distinction between private and official acts in total, it would be much easier to dispose of the immunity in the individual case. Nonetheless, after the *Yerodia* case, it seems that the private/official act differentiation is here to stay.

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<sup>201</sup> See section 4.2.1 and the *Yerodia* Case *supra* note 21, para. 55.

<sup>202</sup> Wouters p. 262-263.

<sup>203</sup> *Ibid.* p. 263, note 62.



## 6 Concluding Remarks

It is evident that a distinction exists today in customary international law for individual immunities enjoyed in front of international tribunals on one side and national courts on the other side. It is obvious from my investigation of international case law that there can be no claim to immunity in front of international tribunals. The same thing is not true for domestic courts. Here, claims to procedural and (as argued by me) substantive immunity would still be successful.

There can be no existence of a customary international law rule limiting the immunity in front of national courts for Heads of State accused of international crimes. The reason for this is that there is not yet enough case law from the national courts to confirm this new rule. An element of time is required in addition to State practise, meaning that the practise have to be consistent in time. Once this practise becomes widespread, uniform and consistent, the new legal regime could be considered as law *de lege lata*.

In the words of the ICJ in the *Yerodia* case, "...immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they have committed, irrespective of their gravity."<sup>204</sup> The four scenarios envisaged by the ICJ in paragraph 61 (see section 2.2 for the full paragraph text) of the *Yerodia* judgement have been criticized as having no practical effect by for instance judges Higgins, Kooijmans and Buergenthal.<sup>205</sup> I agree with the dissenters, since I do not find it very likely that a State will be waiving the immunity for its Head of State on trial in a foreign country. It is not that probable either, that the Head will be prosecuted in his home State, since international crimes are often committed with the knowledge or involvement of that State. In addition, there can be problems bringing the accused in front of an international tribunal, depending on the jurisdiction of the tribunal. The principle of complementarity could constitute a problem as well, in this regard, since the primary responsibility to prosecute lies on the national States. Of the scenarios pictured by the ICJ, the most realistic is the possibility of instituting proceedings in a foreign court against the Head of State after he has left office, but as the ICJ pointed out, this can only be done for acts taken in a private capacity. Although immunity from jurisdiction does not mean impunity in respect of the crimes committed, there is a rather large risk that the perpetrators of these horrible crimes will be left unpunished.

Even if the writers in the legal literature would be right in claiming that there exists a new customary law rule limiting immunity *ratione materiae* for international crimes, the immunity *ratione personae* would still be in place and bar prosecutions from being brought against incumbent Heads of State. As concluded above, the procedural immunity (in front of national

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<sup>204</sup> *Yerodia* Case *supra* note 21, para. 60.

<sup>205</sup> Joint Separate Opinion *supra* note 32, para. 78.

courts) is absolute. There are well-founded reasons why the procedural immunity should be left intact; it is there for a functional purpose and it serves this purpose well. It is not hard to think of situations where the functions of a Head of State would be hampered should he be exposed to a foreign country's criminal investigation. Zappalà mentions the situation where a Head of State accused of war crimes is invited to peace talks in a foreign country. If he then should be arrested on the other State's territory, this would, of course, seriously hamper the peace process.<sup>206</sup> The sudden instigating of proceedings against an incumbent State Official when on a State visit to a foreign country could lead to worse scenarios than the non-prosecution. For instance, hostilities between the two countries concerned could easily arise in such a situation. The New York court in *Baez* concluded for example that President Baez was entitled to a claim of immunity because such immunity was "...essential to preserve the peace and harmony of nations..."<sup>207</sup> Were it possible for the procedural immunity to be limited, it is obvious that this situation could create several difficulties.

Even though the *Yerodia* case has received its fair share of critique as a conservative and backward looking judgment, it stands intact as the leading case today on personal immunities for high State Officials and as such, will have a deep impact on the way national courts apply the law on immunities. In the somewhat bitter words of McLachlan, "...the conservatism at the core of the decision is bound to have a chill effect on national judicial activism on related immunity issues, and this inhibits the further development of state practise."<sup>208</sup> The conclusions drawn in this thesis for the current state of the law on personal immunities does not go hand in hand with the wishes of many human rights fighters. It goes without saying that I am also of the belief that serious human rights violators should be brought to justice and not be freed from responsibility. It is my conviction, however, that it is crucial to distinguish between the two concepts of law *de lege lata* and law *de lege ferenda*. Just because the world would be a better place had the alleged customary rule existed, it does not bring it into being.

## 6.1 What is in The Future?

Although I am of the belief that today it is not possible to prosecute Heads of State charged with international crimes in front of foreign courts, I am not satisfied with the way the law stands today. I believe that perpetrators of horrendous crimes such as international crimes must be held accountable for their actions. An exception to the immunity for Heads of State regarding international crimes is an excellent suggestion. Claiming the existence of a rule that is not yet here is, however, the wrong way to go. There is a need for some kind of codification on the subject or proof of an evolving custom where the immunity has been explicitly limited for grave crimes like

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<sup>206</sup> Zappalà p. 600.

<sup>207</sup> *Hatch v. Baez*, 7 Hun 596 (NY 1876), the quote is cited in Bianchi 1999, p. 256, note 79.

<sup>208</sup> McLachlan p. 963.

international crimes. I think that the debate on Head of State immunity for international crimes is better held on a political level. No matter how important the immunity question is and the attempts that has been made to limit it for international crimes, much of the attention should be directed on the will of States to prosecute State Officials. After all, it is the political will of States to hold perpetrators of international crimes responsible that will be of crucial importance of whether perpetrators of these crimes should walk free or not.

Public international law is a developing area of law. In this thesis, I have discovered two national court cases (*Pinochet* and *Bouterse*) that could point in the direction of the future possible limitation of immunity for international crimes. In the future, additional State practise limiting the immunity for Heads of States who allegedly have committed international crimes could help the formation of a new customary law rule. There is a case pending in front of the ICJ today between the Republic of Congo and France that concerns Head of State immunity.<sup>209</sup> The Congo instituted proceedings against France on account of a breach of the principle of sovereign equality among all members of the United Nations and for the violation of the criminal immunity of a foreign Head of State. The dispute arose when France allegedly issued a warrant instructing police officers to take evidence from the President of the Congo, Mr Denis Sassou Nguesso, while he was on a State visit to France. As of today, the parties have not yet put forward their final submissions to the court and as a result, the case will not be decided any time in the near future. It is possible here that the ICJ will make a u-turn and reverse its earlier ruling in the *Yerodia* case. This is however, not the most probable scenario.

The balancing between the sovereignty of States and the need to prosecute those responsible of international crimes, have, after *Yerodia*, tipped over on the sovereignty side. Heads of State travelling the world carrying a heavy baggage can therefore, for the time being, safely stick to their itineraries. Nevertheless, they should not exceed their time plans, because an evolvement of customary international law might soon catch up with them.

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<sup>209</sup> *Case Concerning Certain Criminal Proceedings in France*, (Republic of the Congo v. France). Request for the indication of a provisional measure. The judgment is available at <http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm>. Last accessed 13 May 2005.

# Annex 1

## **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

### **Article 1**

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

## **Rome Statute of the International Criminal Court, 1998**

### **Article 27**

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.

## **Draft Code of Crimes Against the Peace and Security of Mankind, 1996**

### **Article 7**

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

## **Princeton Principles on Universal Jurisdiction**

### **Principle 5**

With respect to serious crimes under international law as specified in Principle 2 (1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

## **Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law**

### **Article 2**

In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.

### **Article 11 (3)**

Nothing in this Resolution implies nor can be taken to mean that a Head of State enjoys an immunity before an international tribunal with universal or regional jurisdiction.

### **Article 13**

1. A former Head of State enjoys no inviolability in the territory of a foreign State.
2. Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.

## **Statute of the International Court of Justice**

### **Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

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.

### **Article 59**

The decision of the Court has no binding force except between the parties and in respect of that particular case.

## **Vienna Convention on the Law of Treaties**

### **Article 53**

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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