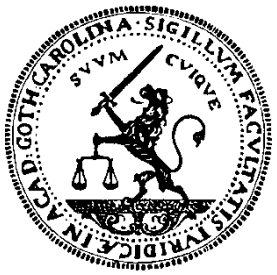

FACULTY OF LAW
Lund University

Magnus Mannerström

Head of State Immunity and International Crimes

JUR091 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Professor Per Ole Träskman

Semester of graduation: Spring semester 2015

Contents

Summary

The aim of this thesis is to explore the status of the immunity afforded to heads of state for serious international crimes. The central question asked is whether heads of state at the present time can commit international crimes and still be granted impunity.

The concept of head of state immunity developed from immunity afforded to states and is based on the principles of state-sovereignty and equality between states. Until the middle of last century such immunity was absolute. Thereafter, the rationale for the immunity shifted to a theory of functional necessity and was instead determined in accordance with diplomatic immunity. Diplomats are entitled to immunity for acts while in office, but can be held responsible in certain circumstances after leaving office. This distinction between immunities afforded to *serving* or *former* state officials have resulted in two types of immunity; personal immunity and functional immunity. The former is title-based and attached to the official position. The latter is conduct-based and attached to the act performed and therefore becomes relevant only after the state official leaves office. The extent of these immunities with regards to heads of state is determined by customary international law.

Customary international law provides that serving heads of state enjoy personal immunity before national courts of other states for all acts. The concept of functional immunity afforded to former heads of state is more complex. It is clear that functional immunity does not provide protection for private acts, but serious international crimes are not private acts. Despite international practice indicating the contrary, it is held in this thesis that the functional immunity of former heads of state is intact, unless removed in case of an exception to the customary rule providing immunity. Such an exception might be that the home state of the head of state waives the immunity or that it enters into an international agreement which removes the

immunity between the contracting states. The conclusion is that foreign domestic courts provide limited possibilities to fight impunity.

International *ad hoc t*ribunals and hybrid courts are more effective for the prosecution of heads of state for serious international crimes. In case the tribunal or court is established by the Security Council acting under Chapter VII of the *UN Charter*, the immunity afforded to both serving and former heads of state is removed. In case the court or tribunal is established by an agreement, without the powers of the UN Security Council, the functional immunity of a former head of state can still be removed when the statute of the court contain a clause establishing the irrelevance of official capacity. In this thesis it is held that the personal immunity provides protection for serving heads of state despite such a clause, although there is case law suggesting the contrary. Because of this, and since the jurisdiction of *ad hoc* tribunals and hybrid courts are often limited to specific regions and to specific periods of time, they are not available as a universal solution to end impunity.

The ICC is based on a treaty, the *Rome Statute*, removing the immunity of both serving and former heads of state of the state parties. Also, the Security Council can refer situations to the ICC while acting under Chapter VII of the *UN Charter*. Under such a referral, the ICC has universal jurisdiction and the immunity of both serving and former heads of state of *non-party* states is also removed. Under the principle of complementarity, a case is only admissible to the ICC if a state is unwilling or unable to genuinely investigate or prosecute the responsible head of state. Also, a Security Council referral is only possible in case all of the five permanent members abstain from their veto powers. This limits the power and effectiveness of the ICC in the fight against impunity.

The conclusion of this thesis is that present heads of state in many circumstances still can commit serious international crimes and invoke immunity. But important steps against impunity have been taken in recent years, signaling that there might be an end to impunity in the future.

Sammanfattning

Syftet med uppsatsen är att utforska och behandla statschefers rätt till immunitet vid grova folkrättsbrott. Den centrala frågan för uppsatsen är om statschefer idag kan begå brott mot folkrätten och ändå beviljas straffrihet.

Immunitet för statschefer har utvecklats ur immuniteten för stater, som är baserad på att varje stat är suverän och likställd med andra stater. Fram till mitten av nittonhundratalet var immuniteten för statschefer absolut. Efter den tidpunkten förändrades staters behov för immunitet och immuniteten för statschefer motiverades istället utfrån en teori om ett funktionellt behov, med modellen för diplomatisk immunitet som utgångspunkt. Diplomatiska företrädare åtnjuter immunitet i den mottagande staten, men kan under vissa förutsättningar hållas ansvariga för sina handlingar när de avslutat sin tjänstgöring. Denna distinktion mellan immunitet som åtnjuts av *sittande* och *före detta* representanter för staten har resulterat i två skilda typer av immunitet; personlig immunitet och funktionell immunitet. Den förra är titelbaserad och knuten till den officiella positionen inom staten. Den senare är handlingsbaserad och knuten till själva handlingen och dess officiella karaktär, och blir därför relevant först efter avslutad tjänstgöring. Omfattningen av dessa två slags immuniteter bestäms utifrån internationell sedvanerätt.

Internationell sedvanerätt visar att sittande statschefer är berättigade till personlig immunitet för alla handlingar, både officiella och privata, inför andra staters nationella domstolar. Situationen för funktionell immunitet, som åtnjuts av före detta statschefer, är mer komplex och ger skydd för officiella handlingar som kan tillskrivas staten, men inte för privata handlingar. Grova folkrättsbrott är inte att se som privata handlingar. Trots viss rättspraxis som indikerar motsatsen argumenteras det i denna uppsats för att den funktionella immunitet som åtnjuts av före detta statschefer är intakt inför andra staters nationella domstolar, om den inte undanröjs på grund av ett undantag till den sedvanerättsliga regel som erbjuder

immunitet. Ett sådant undantag kan exempelvis vara att hemstaten upphäver immuniteten eller att staten ingått ett internationellt avtal som underkänner möjligheten att hävda immunitet. Slutsatsen är att andra staters nationella domstolar ger begränsade möjligheter att bekämpa straffrihet för statschefer.

Internationella *ad hoc*-tribunaler och hybrid-domstolar har visat sig mer effektiva för åtal av statschefer vid grova folkrättsbrott. Om tribunalen eller domstolen upprättats av FN:s säkerhetsråd i enlighet med kapitel VII i FN-Stadgan i syfte att bevara internationell fred och säkerhet avlägsnas möjligheten att invända immunitet för både sittande och före detta statschefer. Om domstolen istället har upprättats genom ett internationellt avtal, utan befogenhet från FN:s säkerhetsråd, kan före detta statschefers rätt att invända funktionell immunitet fortfarande nekas om domstolens stadga innehåller en klausul som fastslår att den åtalades officiella status saknar betydelse. I denna uppsats framförs att personlig immunitet ger skydd för sittande statschefer trots en sådan klausul, även om det finns rättspraxis som tyder på motsatsen. I tillägg, eftersom *ad hoc*-tribunalers och hybrid-domstolars jurisdiktion normalt är begränsad till vissa regioner och vissa tidsperioder, är inte dessa tillgängliga som en universell lösning för att uppnå ett slut på straffriheten för statschefer.

Den internationella brottsmålsdomstolen (ICC) etablerades genom *Romstadgan* efter ratificering av 60 stater. Stadgan nekar rätt till immunitet för både sittande och före detta statschefer för de stater som ratificerat stadgan. Dessutom kan FN:s säkerhetsråd, under FN-stadgans kapitel VII, hänskjuta situationer till ICC om de utgör ett hot mot internationell fred och säkerhet. Därigenom får ICC universell jurisdiktion och rätten till immunitet för både sittande och före detta statschefer avlägsnas även för stater som *inte* ratificerat *Romstadgan*. I enlighet med komplementaritetsprincipen har ICC möjlighet att agera endast när en stat är ovillig eller oförmögen att utreda och lagföra den ansvariga personen. I tillägg är en hänskjutning från FN:s säkerhetsråd endast möjlig om alla de fem permanenta medlemmarna avstår från sin vetorätt. Dessa faktorer begränsar ICC’s effektivitet och möjligheter

i kampen mot straffrihet för statschefer som gjort sig skyldiga till folkrättsbrott.

Slutsatsen i denna uppsats är att statschefer idag i många fall fortfarande kan begår grova folkrättsbrott och ändå åberopa immunitet. Men viktiga steg mot straffrihet för statschefer har ändå tagits under senare år, vilket indikerar att det någon gång i framtiden möjligen kan bli ett slut på straffrihet för statschefer vid grova brott mot folkrätten.

Abbreviations

AILJ	Australian International Law Journal
AJIL	American Journal of International Law
ATCA	Alien Tort Claims Act
DLJ	Denning Law Journal
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
GA	General Assembly (UN)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
SC	Security Council (UN)
SCSL	Special Court for Sierra Leone
SOFA	Status of Forces Agreement
STL	Special Tribunal for Lebanon
TVPA	Torture Victims Protection Act
UN	United Nations
UNTS	United Nations Treaties Series

1 Introduction

1.1 Background

> *"In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through til the end. We ask you [. . .] to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished."*

Those words of hope for universal justice were expressed by the former Secretary-General Kofi Annan during a speech to the International Bar Association in New York on 11 June 1997. The words expressed an intention that no one, not even a head of state, should go unpunished after committing a serious international crime following the establishment of a permanent international court.

The International Criminal Court (ICC) was established five years later on 1 July 2002 by the entry into force of the *Rome Statute*, following the ratification by the necessary 60 states. [1] Within a year, the Court was fully operational. As of today, with the ratification of Palestine on 2 January 2015, a total of 123 states have ratified the *Rome Statute*. This raises the question, have heads of state in charge of international crimes been prosecuted since the establishment of the ICC, or do they still enjoy impunity?

The question contains allegations, that heads of state have been responsible in the past and that they have been granted impunity. However, the allegations are not unfounded. Although the respect for human rights was realized in large parts of the world during the 20th century, it was also gravely violated in others. Following the Second World War, and the establishment of the United Nations, the world vowed that the atrocities that

took place 1939-1945 should never happen again. But history shows us that similar horrendous events did in fact not cease. Sudan, Indonesia, Chile, Nigeria, Uganda, Cambodia, Congo, the Former Yugoslavia and Rwanda are examples of locations where crimes against human rights took place during the last century. Few heads of state were held responsible for their involvement in the events that took place. Customary international law has afforded heads of state with immunity from prosecution, even for serious international crimes.

Attempts have however been made to hold the highest state officials responsible for their actions, sometimes with success. At the end of the last century some states, such as Belgium, adopted progressive legislation for international crimes and issued international arrest warrants claiming universal jurisdiction. International tribunals, such as the International Criminal Tribunals of Former Yugoslavia and Rwanda, were created by the United Nations to ensure that international peace and security could be maintained and restored.

While acknowledging the efforts to bring the responsible leaders to justice through such measures, a reasonable question might still be to ask why these measures are necessary. What is the background and rationale for granting the responsible heads of state immunity for serious international crimes, such as genocide, war crimes and torture?

Today, in 2015, thirteen years after the *Rome Statute* entered into force, this thesis will be used to investigate the current status of head of state immunity before domestic courts, international tribunals and the ICC. By doing so, the thesis aims to answer the following question: can a head of state in 2015 commit a serious international crime and still be granted impunity?

[1] *Rome Statute of the International Criminal Court*, *UNTS*, *vol.* 2187, p. 90. Available at: http://legal.un.org/icc/statute/99_corr/cstatute.htm (2015-05-25).

1.2 Purpose and questions

The purpose of this thesis is to explain the concept of head of state immunity, to conclude the current status of head of state immunity in international law and to answer the question whether impunity still exists in 2015. In order to be able to do so, this thesis needs to answer a number of questions on the way.

- What is the history and rationale for head of state immunity?
- Does a head of state enjoy immunity from jurisdictions of national courts and/or international tribunals?
- What is the status of immunity for heads of state before the ICC?

1.3 Limitations and clarifications

This thesis will discuss the immunities of heads of state in relation to criminal proceedings for international crimes, before international courts and tribunals as well as *foreign* national courts. Hence, it will not discuss immunities of heads of state before their own national courts, since such rules are governed by national law.

Throughout this thesis the terms head of state and high state official will mainly be used. However, the highest executive of a state and the title used by the person holding the position are of course dependent on each state's constitution. They may be presidents, prime ministers, other heads of governments, military leaders etc. By using head of state or high state official it is meant to include all such positions that might be the highest executive of the state, the *de facto* head of state. Further, as the thesis will show, immunities afforded to heads of state can also extend to other high officials of the state, such as foreign ministers.

1.4 Material and outline

Since the concept of head of state immunity to a large extent is based on customary international law, as risen from state practice and *opinion juris*,

relevant case law will be used throughout the thesis. But the cases, as well as the theory of head of state immunity, have also been discussed by many legal scholars. This thesis will therefore examine legal literature and articles on the subject matter. Also, international conventions and other codifications relevant for the topic of the thesis will be investigated as well.

The outline of the thesis is based on the relatively wide scope of the topic chosen. Following the introduction in chapter one, chapter two will describe the history and theory of head of state immunity. The third chapter will describe and analyse the status of head of state immunity before foreign national jurisdictions. The fourth chapter will describe and analyse the status of head of state immunity before international tribunals and courts prior to the establishment of the ICC. The fifth chapter will describe and analyse the status of head of state immunity before the jurisdiction of the ICC. Finally, in the sixth and final chapter some conclusions on the previous chapters will be presented, as well as an analysis of the situation and challenges to the ICC and to the fight against impunity.

2 Head of state immunity in international law

2.1 Introduction

The question of head of state immunity is relevant to consider in three contexts, and a different law applies to each of them. These three are national proceedings against an own former or serving head of state, national proceedings against a foreign former or sitting head of state, and international proceedings against a former or sitting head of state.[2] As mentioned in chapter 1.3 on limitations and clarifications, the law regulating a state's ability to prosecute its own former or sitting head of state is regulated by national law and procedures and will not be dealt with in this thesis. In this chapter the thesis will instead investigate to what extent head of state immunity is a bar to jurisdiction for international crimes before foreign national courts.

Before head of state immunity is discussed further, there will be a short presentation of the immunities afforded to states in general. The purpose is to create a background for later discussions, since head of state immunity is derived from the wider area of state immunity.

2.2 State Immunity

The underlying reasons for the rule of state immunity are said to be the concepts of sovereignty, equality and non-interference.[3] State immunity is inherent in an international legal order consisting of equal states independent in their exercise of power over a certain territory.[4] The rule of state

[2] Bassiouni, M. C., *Introduction to International Criminal Law: Second Revised Edition* (2013), p. 73.
[3] Shaw, M. N., *International Law, Fourth edition* (2002), p. 491.
[4] Van Alebeek, R, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), p. 12.

immunity is expressed in the principle *par in parem non habet imperium*[5] which explains that an equal has no power over another equal. Instead, it is the sovereign state that has jurisdiction over its territory and its citizens. No state may therefore claim superiority or exercise jurisdiction over another state, and foreign states therefore enjoy immunity from the jurisdiction of the domestic courts of other states, regardless of the circumstances.[6] A consequence of this theory of *absolute* state immunity is that *all* acts of a state are granted immunity by the domestic courts of other states, and this was accepted and upheld by most states until the 19th century.[7]

The absolute immunity approach was expressed in the case *The Schooner Exchange v. M'Fadden*[8] from 1812. The background of the case is that the French navy had seized the schooner *Exchange*, owned by two U.S. nationals. After a storm the schooner (then renamed *Balaou*) had sought shelter in the port of Philadelphia. The two original U.S. owners filed a claim before a U.S. court to the right of ownership to the ship. However, eventually the U.S. Supreme Court dismissed the claim and granted France immunity. The Court relied on an implied consent of states to exempt from jurisdiction where the sovereignty of another state was implicated. The case is generally held to be the first judicial expression of the rule of foreign state immunity.[9]

When the theory of absolute immunity was the prevailing approach, no distinction, in this aspect, was made between governmental acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*).[10] However, in the 19th century a more restrictive immunity approach arose and started to be adopted by many states.[11] Some European states, such as Italy and Belgium, had begun to permit exercise of jurisdiction over non-sovereign acts.[12] The

[5] The author of this maxim is Bartolus de Sassoferato in *Tractatus Repressalium* (1354).
[6] Shaw, *supra 3,* p. 494.
[7] Van Alebeek, *supra 4,* p. 13.
[8] *The Schooner Exchange v. McFaddon*, 11 US (7Cranch) 116 (Supreme Court, 1812).
[9] Van Alebeek, *supra 4,* p. 22.
[10] Shaw, *supra 3,* p. 494.
[11] Fox, *The Law of State Immunity* (2002), p. 21f.
[12] Shaw, *supra 3,* p. 496f.

reason was that the increase of states participating in commercial and trading activities had made a change necessary and that it would render states unjust business advantages if they were immune from the jurisdiction of foreign states' courts.[13] The rationale was that state immunity should only be granted in matters when it was necessary for the states to fulfil their functions. Eventually, an increasing number of states started to adopt this restrictive immunity approach. In 1950, in a comprehensive survey of state practice in the case of *Dralle v. Republic of Czechoslovakia*[14], the Supreme Court of Austria concluded that the classic doctrine of absolute immunity was no longer a rule of international law, although some countries such as the U.K. and the U.S. still applied it.

After this change of perspective a distinction had to be made between a state's governmental and commercial acts, i.e. acts for which it could enjoy immunity and acts for which it could not. According to Fox, this distinction is crucial to the present law of state immunity.[15] Although the distinction is theoretical, governmental or sovereign acts are characterized by the fact that they are exercised by the sovereign powers of a state, and commercial or non-sovereign acts are performed by the state as a person or trader.[16] However, such a distinction has been criticised since it could be argued that any state act is carried out for public purposes.[17] Even so, the rule of restrictive immunity is today accepted as the prevailing one.[18] This is amongst others shown in the *European Convention on State Immunity 1972*[19] and the *United Nations Convention on Jurisdictional Immunities of States and their Property* 2004,[20] which both list exceptions to state immunity.

---

[13] Shaw, *supra 3*, p. 491.
[14] *Dralle v. Republic of Czechoslovakia*, 17 ILR 155 (Supreme Court, 1950).
[15] Fox, *supra 11*, p. 22.
[16] *Ibid.*
[17] Bröhmer, J., *State Immunity and the Violation of Human Rights* (1997), p. 19.
[18] Shaw, *supra 3*, p. 499. However, some states such as China and Cuba still support the absolute immunity approach.
[19] Available at *http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm* (2015-05-25).
[20] Available at *http://www.un.org/law/jurisdictionalimmunities/index.html* (2015-05-25). It was adopted by the UN General Assembly through Res. 59/38 of 16 December 2004, but has yet to enter into force.

This thesis will not look further into the differences between governmental and commercial acts since such a task would be too comprehensive and not within the direct scope of this thesis. However, there is a similar parallel to be found regarding the closely related concept of head of state immunity. When looking at immunity for heads of state a similar distinction might be required regarding acts performed in an official or private capacity.

2.3 Basis for head of state immunity

The head of state is the prime representative of the state and international law confers capacity on the head of state to act on behalf of the state.[21] Because of this importance for the proper functioning of the state, the notion of head of state immunity emerged as a personal protection from the jurisdiction of foreign states. However, according to international law, the immunity is not vested in the head of state personally, it belongs to the state.[22] It is the independence of the state and the protection of the ability of its prime representative to carry out international functions that prevent one state from exercising jurisdiction over the head of another state, without the latter's consent.[23]

The justification for head of state immunity can historically be divided into two main groups, *the representative character theory* and *the functional necessity theory*, where the latter developed from the former.[24]

2.3.1 Theories of *representative character* and *functional necessity*

The *representative character theory* originates from the days when the sovereign in person was very close to the state, as expressed by the French 17th century King Louis XIV: "*L´Etat c´est moi!*".[25] According to the theory,

[21] Fox, *supra 11*, p. 427.
[22] Watts, A. *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, Recueil des Cours, vol. 247 (1994), p. 35.
[23] Fox, *supra 11*, p. 427.
[24] Barker, J. C., *International Law and International Relations* (2000), p. 164.
[25] Watts, *supra 22*, p. 35.

the immunity is to be traced to the sovereignty of the state.[26] In conjunction with the previously mentioned *par in parem non habet imperium*, that an equal has no power over another equal, this theory formed the foundation upon which the early rules of head of state immunity rested.[27]

As a development from the *representative character theory*, *the functional necessity theory* emerged during the last century.[28] It is based on the rationale that heads of state need immunity from the jurisdiction of other states in order to be able to conduct their work. The immunity in itself is tied to the act performed, not to the individual performing it.[29] The theory of functional necessity is today considered the rationale for head of state immunity.

2.3.2 Parallells to diplomatic immunity

In early proposals for codifications of immunity afforded to states, such as the *Institut de Droit International's Resolution of 1891*,[30] the immunity of heads of state was included in the treatments of states.[31] This was because of the *representative character theory*, which was the prevailing theory at the time. Thereafter, when the theory of functional necessity developed, head of state immunity had to be separated from immunity afforded to states. Before there was any customary law regulating the issue of immunity of heads of state, it was instead determined in accordance with diplomatic immunities.[32] Diplomatic immunity was developed on a well-established state practice and was justified by the theory of functional necessity, as expressed in the preamble of the 1961 *Vienna Convention on Diplomatic Relations*[33]:

---

[26] Barker, *supra 24*, p. 162.
[27] Watts, *supra 22*, p. 36.
[28] Barker, *supra 24*, p. 164.
[29] *Ibid*.
[30] *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers* from 1891. Adopted on 11 September 1891. Available at: http://www.idi-iil.org/idiF/resolutionsF/1891_ham_01_fr.pdf (2015-05-25).
[31] Fox, *supra 11*, p. 133.
[32] Watts, *supra 22*, p. 35.
[33] *Vienna Convention on Diplomatic Relations* from 1961, UNTS, vol. 500, p.95. Adopted on 18 April 1961. Entered into force on 24 April 1964. Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf (2015-05-25).

"the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."

The representation and official capacity of the diplomatic agents was the rationale for the diplomatic immunity, and since heads of state are the prime representative of the state, it was natural that diplomatic immunities were extended to heads of state.[34] In Art. 39(1), the 1961 *Vienna Convention* provides that the person entitled to immunity enjoys it while in office, and Art. 39(2) provides that the immunity normally ceases when the person no longer holds office. However, if an act was performed in exercise of official functions as a member of the mission, the immunity shall prevail.[35] This is a result from the *functional necessity theory*, that the immunity is tied to the act performed, not to the individual performing it. This principle of functional immunity,[36] established in Article 39 of the 1961 *Vienna Convention*, reflects a rule of customary international law.[37]

When heading special missions, heads of state are afforded diplomatic privileges and immunities in accordance with the *Convention on Special Missions* of 1969[38]. The convention states that the diplomatic staff and representatives of the sending state shall enjoy immunity from the criminal jurisdiction of the receiving state.[39] Apart from heads of state, the immunity from criminal jurisdiction also includes heads of government as well as ministers of foreign affairs and "other persons of high rank".[40] The Convention

---

[34] Nwosu, U. N., *Head of State Immunity in International Law* (2011), PhD thesis, Department of Law of the London School of Economics and Political Science, p. 72. Available at: http://etheses.lse.ac.uk/599/ (2015-05-25).

[35] Article 39(2): "*When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.*"

[36] See further in chapter 2.4 on 'functional immunity'.

[37] Van Alebeek, *supra 4*, p. 225.

[38] *Convention on Special Missions* from 1969, UNTS, vol. 1400, p. 231. Adopted on 8 December 1969. Entered into force on 21 June 1985. Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf (2015-05-25).

[39] Article 31(1): "*The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.* "

[40] 1969 *Convention on Special Missions*, Art. 21.

further states immunity from criminal jurisdiction for both private and official acts. However, similar to Art 39(2) of the 1961 *Vienna Convention*, Art 43(2) provides that when the functions of a member of the special mission have come to an end, the immunity shall normally cease. But, if an act was performed by a person in exercise of his functions as a member of the mission, the immunity shall prevail.

Another convention to be noted is the 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.*[41] Article 1(1)(a) of the convention defines "Internationally protected persons" which 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, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State[…]*". Even though the convention deals with protection of crimes *against* diplomatic agents and heads of state, not acts or crimes *performed by* such persons, it is apparent that there has been a history of affording similar rights to heads of state as to diplomatic agents.

However, although there are considerable influences of diplomatic immunity on the immunity afforded to heads of state, the current theory of head of state immunity cannot be said to be founded upon diplomatic immunity.[42] Both diplomatic immunity and head of state immunity are today instead to be regarded as different aspects of the wider concept of state immunity.[43] Notwithstanding this, some parts of diplomatic law, such as the provisions of the 1961 *Vienna Convention*, must be said to be relevant to some aspects of the position of heads of state.[44] That connection will be discussed in the chapters to come.

---

[41] *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* from 1973, UNTS, vol. 1035, p. 167. Adopted on 14 December 1973. Entered into force on 20 February 1977. Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf (2015-05-25).
[42] Nwosu, *supra 34*, p. 72.
[43] *Ibid.*
[44] Watts, *supra 22*, p. 40.

2.4 Different features of head of state immunity

Under international law, two diverse concepts of immunity are often identified: personal immunity (or immunity *rationae personae)*[45] and functional immunity (or immunity *rationae materiae)*[46].[47] Although this conceptual distinction between personal and functional immunity has been questioned,[48] it now seems to be widely accepted as part of customary international law.[49] In fact, making a distinction between these two features of immunity is vital for understanding head of state immunity. The concepts of these two types of immunity will be given brief explanations below, but will be discussed in more detail in chapter 3 when the status of international state practice is examined.

2.4.1 Personal immunity

Personal immunity is immunity from the jurisdiction of foreign national courts enjoyed by a limited group of state officials because of their official status of the state.[50] The rules are first and foremost applicable to heads of state and diplomatic agents, and recognize the inviolability of such persons. However, it has also been extended to include other official functions such as ministers of foreign affairs.[51] The rationale behind personal immunity is the functioning of international relations since state officials need to be able to work and travel as part of their official function.

---

[45] Sometimes also referred to as *procedural immunity*.
[46] Sometimes also referred to as *substantive immunity*.
[47] Cassese, A., Acquaviva, G., Fan, M. and Whiting, A., *International Criminal Law: Cases & Commentary* (2011), p. 76.
[48] The distinction was not upheld by the ICJ in the *Arrest Warrant case* of 14 February 2002. The case will be discussed further in Chapter 3.
[49] A general acceptance of the distinction between the two types of immunity appears from the ILC's *Report of the 60th session* (2008), A/63/10, para. 287: *"It was generally agreed that a distinction could be drawn between two types of immunity of State officials: immunity ratione personae and immunity ratione materiae. Some members underlined the importance of these concepts to differentiate the status of high-ranking and other State officials, and that of incumbent and former officials."*.
[50] Van Alebeek, *supra 4*, p. 158.
[51] See further the *Arrest Warrant* case in Chapter 3.

Personal immunity was imported from diplomatic law to apply to heads of state.[52] As a reference, Article 29 of the *Vienna Convention on Diplomatic Relations* 1961[53] (Vienna Convention), which is a codification of customary international law, states*: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.*" Article 31 further provides: "*A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.*". Although derived from diplomatic law, personal immunity afforded to heads of state is now commonly accepted.[54]

It should be pointed out that personal immunity relates to procedural law and assures the state official a procedural defence from criminal proceedings in another state.[55] It is not a judgement on the lawfulness of the official's conduct. Individual criminal responsibility and immunity are quite different concepts.[56] In fact, the sheer purpose of personal immunity is to protect individuals from the jurisdiction of other states regarding acts for which the individual is responsible.[57]

2.4.2 Functional immunity

Functional immunity is immunity from the jurisdiction of foreign national courts enjoyed by state officials because of the official character of the act itself.[58] It is grounded on the notion that a state official is not accountable to other states for acts performed as part of their official capacity and that such acts instead must be attributed to the state.[59] As opposed to personal immunity, it is conduct-based rather than title-based. And since functional immunity attaches to the act instead of the state official, it may be relied on

[52] Watts, *supra 22*, p. 61.
[53] Available at https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf.
[54] Van Alebeek, *supra 4*, p. 169.
[55] Cassese, A. *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, EJIL* (2002), Vol. 13 No. 4, p. 864.
[56] As pointed out by the ICJ in the *Arrest Warrant* case, para 60. See further Chapter 3.
[57] Van Alebeek, *supra 4*, p. 266.
[58] *Ibid*, p. 222.
[59] Cassese, *supra 55*, p 862; Van Alebeek, *supra 4*, p. 239.

by all who have acted on behalf of the state.[60] In a way, it is a mechanism for transferring responsibility to the state. This applies also if the official has acted *ultra vires* since international law does not allow states to determine whether a state official of a foreign state has acted within his mandate. Such judgement is within the exclusive competence of the home state.[61]

The fact that acts are attached to the state does however not mean that the functional immunity is part of the law of state immunity.[62] But there are similarities. Functional immunity also extends to governmental acts and commercial acts, unless they were performed in a private capacity. Acts are official in nature only when the act is exclusively attributable to the state.

Since the act is regarded as performed by the state, functional immunity relates to substantive law and assures the state official a substantive defence from criminal proceedings in another state. As a logical consequence, the immunity survives the term of the official functions of the representative.[63] Moreover, the functional immunity applies *erga omnes*, and not only between the receiving and the sending state. [64]

[60] Akande & Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, EJIL Vol. 21 no. 4, p.825.
[61] Van Alebeek, *supra 4*, p 239.
[62] Akande & Shah, *supra 60*, p. 827; Van Alebeek, *supra 4*, p. 114.
[63] A similar provision can be found in Article 39 (2) of the 1961 *Vienna Convention*, quoted above, which specifically provide that immunity for acts performed by a state official in the exercise of his functions shall continue to subsist.
[64] Van Alebeek, *supra 4*, p. 114.

3 Head of state immunity before national jurisdictions

3.1 Introduction

There are several cases involving head of state immunity before domestic courts for crimes outside the group of serious international crimes within the scope of this thesis. As an example, in the French judgement concerning the Libyan president Gaddafi,[65] who was indicted for his role in the destruction of a French civilian aircraft (Lockerbie) in 1988, the Cour de Cassation concluded that international custom opposes that heads of state in office can be subject to prosecution before the criminal jurisdiction of a foreign state. Therefore, the Court concluded that Gaddafi was entitled to personal immunity from prosecution.[66]

However serious a crime of terrorism may be, this thesis will instead focus on the relatively few cases where the question of head of state immunity of serving or former head of state have been at focus in cases of the most serious international crimes, crimes possibly amounting to *jus cogens* international crimes.[67] To illustrate the status of head of state immunity before national jurisdictions this thesis will investigate personal and functional immunities separately, i.e. separate the question of head of state immunity for a serving head of state and for a former heads of state.

[65] *Gaddafi* 125 ILR 490 (Court of Appeal & Court of Cassation, 2000, 2002) (*Gaddafi* case).
[66] Van Alebeek, *supra 4*, p. 268.
[67] See further chapter 3.3.4.2 for the definition of "*jus cogens* international crimes".

3.2 Personal immunity before national jurisdictions

3.2.1 Belgium v. Congo (*Arrest Warrant* case)

In the *Arrest Warrant* case[68] the ICJ concluded that a serving foreign minister shall be granted immunity even from charges of serious international crimes. The background of the case was that Belgium in 1999 had adapted its war crimes legislation to the standards of the *Rome Statute* from 1998, which states the irrelevance of official capacity.[69] The new addition in the Belgian law stated (in translation) that "*The immunity attributed to the official capacity of a person, does not prevent the application of the present Act*". This meant that the new legislation did not recognize any immunity.[70] Under this newly adopted law, and while exercising universal jurisdiction, an investigating judge issued an international arrest warrant against Mr. Abdulaye Yerodia Ndombasi, the serving foreign minister of the Republic of Congo. The crimes listed in the arrest warrant were war crimes and crimes against humanity. The Republic of Congo filed an application with the ICJ complaining that Belgium, by issuing the arrest warrant, had violated the personal immunity[71] of their foreign minister, as well as the principle *par in parem non habet imperium*.

In its judgement, the ICJ held the immunity from criminal jurisdiction of ministers of foreign affairs is absolute for all acts, both private and official:

"[…] the functions of a Minister of Foreign Affairs are such that […] he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protects the individual concerned against any act of authority of another State which would hinder him or her in performance of his or her duties."[72]

---

[68] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgement, ICJ Reports 2002 3.
[69] Van Alebeek, *supra 4*, p. 269. See also Art. 27 of the *Rome Statute* and chapter 5.5.1 in this thesis.
[70] *Ibid*, p. 270.
[71] Interestingly, the Republic of Congo did not refer to immunity for high state officials, but turned to the 1961 *Vienna Convention on Diplomatic Immunities*.
[72] *Arrest Warrant* case, para. 54.

The reasoning was that the performance of the official functions would be prevented in case a foreign minister was not able to travel freely. The question was, however, whether such immunity should be granted even in cases of serious international crimes? After having carefully examined state practice, including national legislation and decisions of national higher courts such as the *House of Lords* and the French *Cour de Cassation*, the ICJ held that:

"[…] It has been unable to deduce from this practice 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 Affaires, when they are suspected of having committed war crimes or crimes against humanity."[73]

The conclusion was that the personal immunity of a sitting foreign minister is absolute. But the ICJ added in an *obiter dictum* that the conclusion does not represent a bar to criminal prosecution in four different circumstances: a) the accused may still be tried in his or her home country, b) the national state can waive the right to immunity, c) the person can be tried for private acts when no longer in office, and finally, d) the accused may still be tried before an international criminal court.[74]

In conclusion, the ICJ found that the general rule based on customary law applies, granting serving foreign ministers immunity from criminal charges in foreign states national courts even when serious crimes such as war crimes and crimes against humanity are at hand. As such, the *Arrest Warrant* Case is one of the most important cases in defence of personal immunity.[75] And as can be seen below, the findings in the *Arrest Warrant* case, that the personal immunity of a high state official is absolute, are confirmed in several foreign national jurisdictions. It can also be pointed out that Belgium in 2003, in response to the decision of the ICJ, changed its war

[73] *Arrest Warrant* Case, para. 58.
[74] *Ibid*, para. 61.
[75] At the same time, it has been argued that the case contains some shortcomings. Jurisdiction is a prerequisite to the immunity issue, but the Court did not discuss universal jurisdiction prior to the immunity issue. This might however be explained by the fact that Congo eventually dropped the argument that Belgium had no jurisdiction. The case also only considered the immunity of a serving foreign minister, no other high official functions.

crimes legislation to severely restrict the Belgian courts jurisdictions and instead fully recognize the personal immunity of heads of state, heads of government and ministers of foreign affairs.[76]

3.2.2 Belgium v. Sharon

In 2001, a civilian complaint was filed with a Belgian Court against Ariel Sharon, the serving prime minister of Israel.[77] The complaint charged Sharon for acts of genocide, crimes against humanity and war crimes, which took place in Beirut in 1982. The Belgian Act under which the complaint had been filed was the same as in the *Arrest Warrant* Case. However, in the light of the outcome of the *Arrest Warrant* case, the Belgian *Cour de Cassation* concluded that although the Belgian Act on universal jurisdiction did not recognize official status, the Belgian legislation would be in conflict with customary international law if would set aside the head of state immunity of Ariel Sharon.[78] Therefore, the case was dismissed by the Court.

3.2.3 Spain v. Fidel Castro

Similarly, in 1999, in a Spanish case against Fidel Castro[79] the Spanish *Audiencia Nacional* in its decision not to extradite Castro concluded that a serving head of state has absolute immunity from the criminal jurisdiction from foreign courts, even in respect of allegations of crimes against international law.[80]

3.2.4 Tachiona v. Mugabe

In the 2001 U.S. case of *Tachiona v. Mugabe*,[81] the serving president Mugabe and foreign minister Mudenge of Zimbabwe faced a class action alleging torture and other human rights violations. The suit was brought pursuant to the U.S. *Alien Tort Claims Act* (ATCA), the U.S. *Torture*

---

[76] Van Alebeek, *supra 4*, p. 273.
[77] *Re Sharon and Yaron*, 127 ILR 110 (Court of Cassation (Second Chamber), 2003); 42 ILM 2003 596.
[78] Nwosu, *supra 34*, p. 97.
[79] *Fidel Castro*, no.1999/2723 (Audiencia Nacional, 1999).
[80] Cassese, *supra 55*, p. 861.
[81] *Tachiona v. Mugabe*, 169 F Supp 2d 259 (District Court for the Southern District of New York, 2001).

Victims Protection Act (TVPA) and international human rights law. The U.S. government filed a suggestion to the Court that Mugabe and Mudenge were entitled to head of state immunity.[82] The question before the court was whether fundamental human rights of *jus cogens* status supersede the head of state of immunity of Mugabe and Mudenge. However, the Court dismissed the class action and upheld Mugabe's personal immunity, even for private acts.

3.2.5 Pinochet case (No. 3)

Further, in the case *Pinochet No.3*,[83] although the case concerned a former head of state, the British House of Lords concluded that its decision not to afford Augusto Pinochet immunity did not affect the immunity of *serving* heads of state, i.e. it did not affect personal immunity.[84] This case will be discussed in further detail in the next chapter.

3.2.6 United States v. Noriega

The case *United States v. Noriega*[85] is the only national court case where personal immunity has been denied to a serving head of state. The case is noteworthy, even though it does not involve serious international crimes. General Manuel Noriega had been seized by U.S. troops in 1990 and faced charges for drug trafficking and money laundry, and Noriega was convicted and sentenced to prison. The case does however not conclude that a serving head of state is not entitled to invoke immunity. Instead, immunity was not accorded on the ground that the US government had never recognized Noriega as head of state.[86]

---

[82] Nwosu, *supra 34*, p. 199.
[83] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, 2 All ER 97 (House of Lords, 1999).
[84] Bianchi, A., *Immunity versus Human Rights: The Pinochet Case*, EJIL (1999), Vol. 10 No. 2, *p. 245*.
[85] *United States v. Noriega*, 746 F Supp 1506 (District Court for the Southern District of Florida, 1990); *United States v. Noriega*, 117 F 3d 1206 (Court of Appeals 11th Circuit, 1997).
[86] Akande & Shah, *supra 60*, p. 820.

3.2.7 Analysis of personal immunity

As illustrated by the cases above, there is no question that serving heads of state, heads of government and ministers of foreign affairs are granted absolute personal immunity from criminal prosecution before foreign national jurisdictions, even for grave breaches against international criminal law. The personal immunity applies regardless if the act was performed in a private or official capacity. This is also confirmed by the doctrine of leading scholars.[87]

Only the U.S. claims the right to subject serving heads of state to its jurisdiction. Even though they acknowledge the concept of head of state immunity, they do not recognize that the U.S. jurisdiction can be limited by international law in that regard.[88] In accordance with the so called "*Flatow Amendment*"[89] the U.S. courts can withhold head of state immunity in case a state is designated "a state sponsor of terrorism".[90] But that is the exception, and personal immunity of state officials stands intact before foreign national courts, unless it is waived by the state.

This view of personal immunity as *lex lata* was also confirmed in 2013 by the ILC. After its sixty-fifth session the ILC issued a report[91] in which it adopted three draft articles which confirm that heads of state, heads of government, and foreign ministers are entitled to personal immunity from foreign criminal jurisdiction for their public or private acts, and that such immunity ceases once they leave office.[92]

---

[87] Fox, *supra 11*, 430f.; Van Alebeek, *supra 4*, p. 298, Akande & Shah, *supra 60*, p. 824.
[88] Van Alebeek, *supra 4*, p 273.
[89] In 1996, the U.S. Congress added a cause of action to modify the FSIA. This amendment provided that *"[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism […] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national […] for personal injury or death caused by the acts of that official, employee, or agent for which the court of the United States may maintain jurisdiction"*. Several U.S. district courts have construed the "Flatow Amendment" to provide a private right of action against a foreign government. From: *American International Law Cases Fourth Series*: 2009, Vol. 5, p. 1528.
[90] Van Alebeek, *supra 4*, p 273.
[91] ILC 2013 Report, A/68/10. Available at: http://legal.un.org/ilc/reports/2013/english/chp5.pdf (2015-05-25).
[92] "*Article 4: Scope of immunity ratione personae*

The current status of personal immunity does not mean that no exceptions may develop in state practice. If states agree that individual criminal responsibility outweighs the interest to protect those responsible, they may decide to develop an exception for crimes against international law.[93] Investigating such exceptions is one of the topics for the ILC in future sessions. Personal immunity is a procedural defence and a change of law can only take place by a change in state practice, and as has been illustrated by the case law, such a change has not taken place.[94]

3.3 Functional immunity before national jurisdictions

As was explained above, functional immunity derives from the fact that the official act is attributable to the state. As a consequence, crimes against international law committed by state officials must be regarded as official acts, and the only way to remove the immunity of the official would be through a separate rule establishing an exception.[95] The question is whether such an exception exists. The limited customary international law available has however been shifting and to some extent inconclusive on the matter.

3.3.1 Eichmann case

In the *Eichmann* case[96] from 1962, the Supreme Court of Israel denied Adolf Eichmann functional immunity on the ground that state officials may not escape responsibility in case of international crimes. The case is worth mentioning even though Eichmann was not head of state, since it regards immunity of a former senior state official and is a landmark in the domestic

---

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae only during their term of office.
2. Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity ratione personae is without prejudice to the application of the rules of international law concerning immunity ratione materiae."

[93] Van Alebeek, *supra 4*, p 267.
[94] *Ibid*, p. 298.
[95] *Ibid*, p. 223.
[96] *Attorney General of Israel v. Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961).

implementation of international criminal law. Also, functional immunity applies to anyone acting on behalf of the state.

In 1960, Eichmann had been abducted by Israeli agents in Argentina to stand trial for his actions during World War II. Charges were brought against Eichmann for crimes against the Jewish people (genocide) and crimes against humanity under the 1950 *Nazis and Nazi Collaborators (Punishment) Law*.[97] The main defence by Eichmann was the he only had followed orders from his superiors.[98]

A relevant fact for the outcome of the case is that the UN General Assembly, on 11 December 1946 unanimously had adopted Resolution 95 which affirmed the principles recognized by the Charter of the Nuremberg Tribunal.[99] In its judgement, the Supreme Court noted that these principles reflected customary international law. [100] Article 7 of the Nuremberg Charter of the International Military Tribunal state the irrelevance of official capacity:

"*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*."

Further, the Court explicitly stated that state officials acting in their official capacity cannot invoke immunity if they commit a crime against international law.[101] Consequently, Eichmann was not entitled to functional immunity for his actions and was sentenced to death and executed by hanging on 31 May 1962.[102]

[97] Cassese, *supra 47*, p. 77.
[98] *Ibid.*
[99] See further chapter 4.1.
[100] Cassese, *supra 55*, p. 871
[101] Cassese, *International Criminal Law* (2008), p. 305.
[102] Cassese, *supra 47*, p. 79.

3.3.2 Pinochet case (No. 3)

In the case *Pinochet No.3*[103] the British House of Lords was to answer the question whether Pinochet as former head of state of Chile was entitled to functional immunity. The background of the case was that Spain in 1985 had adopted a law introducing the principle of universal jurisdiction for the crime of genocide,[104] and in 1998 a Spanish judge requested that U.K. authorities arrest Pinochet in London (where he had come for medical treatment) for extradition to Spain. The arrest warrant was based on charges of genocide, torture and kidnapping that took place in Chile in the period 1973-1990, also against Spanish citizens.[105] The case involves several warrants and appeals[106] and was also complicated by the fact that torture committed outside the U.K. was not criminalized under U.K. legislation until 29 September 1988, and that the 1989 U.K. Extradition Act contained a double criminality rule.[107] An important factor is also that the 1984 *Torture Convention*[108] was ratified by the U.K. on 8 December 1988. In the end, the question before the Lords came to be whether Pinochet was entitled to functional immunity for the alleged crimes of torture that had occurred in Chile after 29 September 1988. In case he was not entitled to immunity he could be extradited to Spain to stand criminal trial.

By a majority of six to one, the Lords found that Pinochet's official position as head of state did not entitle him to functional immunity. In their reasoning, the Lords based their decision on domestic law[109] which declared

---

[103] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, 2 All ER 97 (House of Lords, 1999).
[104] Beigbeder, *International Justice Against Impunity* (2005), p. 55.
[105] *Ibid.*
[106] The judgement in *Pinochet No.1* was declared void since one of the judges (Lord Hoffman) was a director and chairman of Amnesty International, which had intervened in the case.
[107] Van Alebeek, *supra 4*, p. 224.
[108] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* from 1984, UNTS, vol. 1465, p. 85. Adopted on 10 December 1984. In force on 26 June 1987. Available at: http://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf (2015-05-25).
[109] The U.K. 1978 *State Immunity Act*, section 20.1, provides that the U.K. 1964 *Diplomatic Privileges Act* applies to heads of state, which in turn gives effect to the 1961 *Vienna Convention*.

that international law regarding diplomatic privileges and relations, the 1961 *Vienna Convention*, applied to former heads of state. As explained previously in chapter 2.3.2 of this thesis, Art. 39(2) of the convention reflect the rule of functional immunity under customary international law, and entitle former state officials immunity for official acts, but not for private acts. The decision of the Lords contained a conclusion that acts of torture were seen as acts performed outside the functions of the official position as head of state:

"Acts of torture and hostage taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability. It is not consistent with the existence of these crimes that former officials, however senior, should be immune from prosecution outside their own jurisdictions."[110]

However, the decision was based on several unique specifics of the case and although the majority agreed to not entitle Pinochet immunity, their reasoning and opinions on several critical issues leading up to the conclusion was very diverse.[111] All seven Lords delivered separate opinions, and the conclusions of these are relevant for the evaluation of the precedence of the case.

Lord Saville and Lord Brown-Wilkinson considered that the universal jurisdiction over the crimes of torture was established by the ratification of the 1984 *Torture Convention*. Since jurisdiction is a prerequisite to immunity, the decision not to afford immunity was therefore dependent on the ratification. In the word of Lord Saville:

"So far as the states that are parties to the convention are concerned, I cannot see how, as far as torture is concerned, this immunity can exist consistently with the terms of that convention. Each state party has agreed that the other parties can exercise jurisdiction over alleged official torturers found within their territories…and thus, to my mind, can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."[112]

---

[110] The quotation was referred to in *Pinochet No.3*, but is originally from the case *Pinochet No.1* (Pinochet I, House of Lords – Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet, on 25 November 1998, 4 All E.R. 897).
[111] Van Alebeek, *supra 4*, p. 226.
[112] *Pinochet No. 3*, p. 169; in Van Alebeek, *supra 4*, p. 228.

Lord Hope, Lord Philips and Lord Hutton argued that functional immunity from criminal jurisdiction cannot be afforded in respect of crimes against international law,[113] but both Lord Hope and Lord Philips still referred to the 1984 *Torture Convention* and argued that the obligations of the convention were incompatible with functional immunity.[114] In the words of Lord Hope:

"In my opinion, once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the convention to invoke immunity ratione materiae in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity."[115]

The Lords decision heavily relied on the 1984 *Torture Convention*, and not all international crimes are supported by a convention granting universal jurisdiction.[116] Also, Art. 1(1) of the 1984 *Torture Convention* explicitly limits torture to acts of *"a public official or other person acting in an official capacity*".[117] These specifics of the case limit the applicability of the decision as precedence in cases involving functional immunity for other types of international crimes. The decision in the case was not based on any general practice recognising the non-applicability of head of state immunity for international crimes, it was based on the technicalities of the 1984 *Torture Convention*.[118] The conclusion of the decision of the Lords is that if Chile had not been a party to the 1984 *Torture Convention*,[119] Pinochet would most likely have been granted immunity. However, some scholars still argue that the outcome, and especially the separate opinions of Lords

---

[113] Van Alebeek, *supra 4*, p. 237.
[114] *Ibid.*
[115] *Pinochet No. 3*, p. 152; in Van Alebeek, *supra 4*, p. 231.
[116] Van Alebeek, *supra 4*, p. 237.
[117] *Full text of 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."*
[118] Nwosu, *supra 34*, p. 203.

Browne-Wilkinson, Hope, Millett and Phillips, is evidence of a customary rule that functional immunity cannot excuse international crimes.[120]

3.3.3 Belgium v. Congo (*Arrest Warrant* case)

Although the *Arrest Warrant* case primarily concerned personal immunity, the ICJ formulated its view on functional immunity like this:

"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 during that period of office in a private capacity."[121]

The reasoning of the ICJ gives that former state officials are immune from criminal jurisdiction if the act is considered an official act, but not if it is considered a private act. The statement from the Lords in *Pinochet No.3* that torture is an act performed outside the functions of the official position as head of state seems to suggest a similar conclusion. The question must therefore be whether the act was performed by the individual as a part of his or her official function? Whether this is the correct interpretation will be discussed in the next chapter.

3.3.4 Analysis of functional immunity

As seen from the cases in the previous chapter, the status of functional immunity for former heads of state before national jurisdictions is more complex than the status of personal immunity. The cases illustrate that there are exceptions to functional immunities in case of serious international crimes. Further, the Institut de Droit International, in its *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes* from 2009 stated in Art. III(1): *"[n]o immunity from jurisdiction other than personal immunity international law applies with regard to international crimes."* This would mean that functional immunity does not apply in such cases.

---

[119] Chile ratified the 1984 *Torture Convention* on 30 September 1988.
[120] Cassese, *supra 55*, p. 871.
[121] *Arrest Warrant* case, para. 61.

Cassese lists an extensive post World War II practice where functional immunity has not been upheld, amongst others the *Eichmann* case and the case *Pinochet No. 3*.[122] Many of the other cases involve other state officials than heads of state, but Cassese argues that it would be odd if a customary rule that removes functional immunity would not apply to all state officials who commit international crimes.[123] The same conclusion on the status of functional immunity has also been reached by Akande and Shah:

"There have been a significant number of national prosecutions of foreign state officials for international crimes. All of these decisions proceed – at least implicitly (and sometimes explicitly) – on the basis of a lack of immunity ratione materiae in respect of such crimes."[124]

Different arguments and theories have been suggested as to how to interpret and explain the outcomes and conclusions regarding functional immunities in case law.[125] Is the explanation a customary international rule removing the immunity, or is there another explanation to be found? It has been suggested that the international crime cannot be regarded as an official act of a representative of a state. It has also been argued that the *jus cogens* status of certain human rights "trump" the customary rule of functional immunity, or that the international crime in itself implies a waiver of the immunity. Further, it has been suggested that rules conferring extra-territorial jurisdiction may of themselves displace prior immunity rules.[126] This thesis will now look into these explanations to see if it is possible to conclude that there exists a separate rule establishing an exception to functional immunity in case of serious international crimes.

Cassese, *supra 55*, p. 870. The cases Cassese refer to are: *Eichmann* in Israel, *Barbie* in France, *Kappler*, *Priebke* in Italy, *Rauter*, *Albrecht* and *Bouterse* in the Netherlands, *Kesserling* before a British Military Court sitting in Venice and *von Lewinski* (called *von Manstein*) before a British Military Court in Hamburg, *Pinochet* in the UK, *Yamashita* in the US, *Buhler* before the Supreme National Tribunal of Poland, *Pinochet* and *Scilingo* in Spain, *Miguel Cavallo* in Mexico.

[123] Cassese, *supra 55*, p. 871.

[124] Akande & Shah, *supra 60*, p. 839.

[125] *Ibid.*

[126] *Ibid*, p. 817.

3.3.4.1 International crimes are not official acts?

In the *obiter dictum* of the Arrest Warrant case, the ICJ suggests that functional immunity does in fact protect the former heads of state from prosecution for international crimes committed while in office. This is a consequence of the Court's conclusion that prosecution would be possible "*in respect of acts committed during that period of office in a private capacity*".[127] If prosecution of former heads of state is only possible for private acts, then the immunity must be a protection for all official acts. In this sense, the conclusion follows the customary rule for diplomatic immunity codified in Article 39(2) of the 1961 *Vienna Convention*.

If this is correct, international crimes such as genocide, war crimes, torture etc., must be regarded as private acts in order for a former head of state to be prosecuted. Some of the Lords in the case *Pinochet No.3* seem to have reasoned in a similar way when concluding that torture could only be performed outside the functions of the official position as head of state. In the words of Lord Hutton:

"I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."[128]

Some scholars agree with this theory that international crimes can never be regarded as official acts of the state.[129] However, other scholars argue that this distinction is not necessary. Cassese, in his comments to the *Arrest Warrant* case stated that the distinction between official acts and acts performed in a private capacity, in this context, is "*ambiguous and untenable*".[130] He concluded:

---

[127] *Arrest Warrant* case, para. 61.
[128] *Pinochet No.3*, p. 165.
[129] Bianchi, *supra 84*, p.265.
[130] Cassese, *supra 55*, p. 867.

"That international crimes are not as a rule 'private acts' seems evident. These crimes are seldom perpetrated in such capacity. Indeed, individuals commit such crimes by making use (or abuse) of their official status."[131]

For this reason, Cassese questions the conclusion on functional immunity in the *Arrest Warrant* case.[132] In case only private acts are not protected by functional immunity, and an international crime cannot be a private act, then all former heads of state would be granted impunity for international crimes.

Akande & Shah also consider that the theory that international crimes cannot be official acts must be rejected.[133] They argue that an international crime is as much an official act as any other. It is not the legality of the act that determines whether it is official or private, it is *"the nature of the act as well as the context in which it occurred*".[134] The same view is shared by Watts:

"A Head of state clearly can commit a crime in his personal capacity; but it seems equally clear that he can, in the course of his public functions as Head of state, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of the Head of states 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."

Also, the act of torture, as defined in Art 1(1) of the 1984 *Torture Convention* must be performed by *"a public official or other person acting in an official capacity*". Acts of torture performed in a private capacity cannot be described as torture under the convention. This of course also totally contradicts that serious international crimes should be regarded as private acts. For the reasons stated above, it is hard to find any bearing in this theory.

[131] *Ibid*, p. 868.
[132] *Ibid*. p. 866.
[133] Akande & Shah, *supra 60*, p. 831.
[134] Ibid, p. 830.

3.3.4.2 *Jus cogens* international crimes trump functional immunity?

The theory is that a crime against human rights law with *jus cogens* status status (a "*jus cogens* international crime"), entails obligations *erga omnes* not to grant immunity to former heads of state.[135] Human rights norms with *jus cogens* status are said to prevail, or "trump", over other head of state immunity since such immunity is merely part of customary international law.[136] However, this view is problematic for several reasons.

First, there is no generally accepted category of acts amounting to *jus cogens* international crimes. Which acts, if any, would remove head of state immunity? The concept of *jus cogens* is based on an acceptance that some norms are of fundamental and superior value within the legal system.[137] As such, *jus cogens* norms hold the highest position of all legal norms and principles. They are peremptory and non-derogable.[138] The status of *jus cogens* was first codified in Art. 53 of the 1969 *Vienna Convention on the Law of treaties*,[139] which states:

"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."

Only rules based on custom or treaties that are generally accepted by the international law community of states as a whole can become *jus cogens*, therefore their character derives from within international law and from the

[135] Bassiouni, *supra 2*, p. 238.
[136] *Ibid*, p 238.
[137] Shaw, *supra 3*, p. 97.
[138] Bassiouni, *supra 2*, p. 239.
[139] *Vienna Convention on the Law of treaties* from 1969, UNTS, vol. 1155, I-18232. Adopted on 23 May 1969. Entered into force on 27 January 1980. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (2015-05-25)

will of states.[140] However, there is an uncertainty about which international crimes that are of *jus cogens* character, or the precise effect of that characterization.[141] In fact, in its report to the *Vienna Conference*, the ILC itself acknowledged that:

"[t]he formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of jus cogens."[142]

In 2001, in its *Commentary to the Draft Articles on State Responsibility*, the ILC gave as examples of *jus cogens:* the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international law applicable in armed conflicts, and the right to self-determination. [143]

However, the opinions of the leading legal scholars are diverse, and it is not at all certain that all of those examples are *jus cogens* norms. According to Brownlie, the least controversial examples of *jus cogens* are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.[144] But according to Shaw, the *jus cogens* status is controversial even for recognized international crimes such as unlawful use of force, genocide, slave trading and piracy.[145] Based on a *strict* interpretation of the concept of *jus cogens*, it has also been suggested that only the principles underlying basic human rights, such as the principles behind the common Article 3 of the 1949 *Geneva Conventions*[146] and the

---

[140] Nieto-Navia, R., *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, p. 5. Available at: http://www.iccnow.org/documents/WritingColombiaEng.pdf (2015-05-25)
[141] *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*. ILC, fifty-eighth session 2006. A/CN.4/L.682, p. 184.
[142] Nieto-Navia, *supra note 140*, p. 9; ILC Yearbook, Vol. II (1966), pp. 247- 248.
[143] Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in Official Records of the General Assembly, Fifth-sixth Session (A/56/10), p. 283-284.
[144] Brownlie, I., *Principles of Public International Law*, Sixth Edition (2003), p. 515: in Van Alebeek, *supra 4*, p. 306.
[145] Shaw, *supra 3*, p. 97.
[146] The four *Geneva Conventions* from 1949, UNTS, no. 970-973, vol. 75. Adopted on 12 August 1949. In force on 21 October 1950. The conventions (and the additional protocols

1948 *Genocide Convention,*[147] can be truly considered *jus cogens*.[148] In conclusion, the concept of *jus cogens* international crimes seems generally recognized and accepted but it still remains unclear which specific crimes that constitute such *jus cogens* international crimes.

Besides the problem with establishing the *jus cogens* international crimes, it has been argued that this suggested conflict between *jus cogens* and state immunities lack substance since rules of *jus cogens* and immunity operate on different levels.[149] State immunity is a procedural rule and does not contradict a prohibition contained in a *jus cogens* norm, it only diverts any breach of it to a different method of settlement.[150] It is the substantive prohibition of the act (torture, genocide etc.) that has *jus cogens* status, not the tools available under international law to enforce that prohibition. In the absence of a conflict between the two sets of rules, the *jus cogens* quality of one of them cannot "trump" the other.[151]

Further, the argument that *jus cogens* international crimes removes the possibility to invoke immunity as a defence, has been rejected by both the ICJ and the ECtHR.[152] By any logic, in case *jus cogens* international crimes "trump" the customary international law on functional immunity, it should also "trump" the customary international law on personal immunity. But it does not. In the *Arrest Warrant Case*, the ICJ emphasized the different natures of immunity and individual criminal responsibility:

"Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law."[153]

---

from 1977) are available at: https://treaties.un.org/Pages/UNTSOnline.aspx?id=1 (2015-05-25).

[147] *Convention on the Prevention and Punishment of the Crime of Genocide* from 1948, UNTS, vol. 78, p. 277. Adopted on 9 December 1948. In force on 12 January 1951. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf (2015-05-25).

[148] Nieto-Navia, *supra 140*, p. 27.

[149] Nwosu, *supra 34*, p. 124f.

[150] Fox, H., *The Law of State Immunity, Second edition* (2008), p. 151.

[151] Van Alebeek, *supra 4*, p. 319.

[152] Akande & Shah, *supra 60*, p. 837.

[153] *Arrest Warrant* case, para. 60.

Consequently, the ICJ concluded that the alleged *jus cogens* international crimes did not remove the applicability of personal immunity of senior state officials such as the head of state, the head of government, and the foreign minister.

Also, in the case *Al-Adsani vs. U.K.*,[154] the ECtHR rejected that immunity could not be admitted for acts in violation of a *jus cogens* international crime. The case regarded alleged acts of torture, and the ECtHR concluded that it was "*unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State*".

The ECtHR did not afford a norm of *jus cogens* an effect which "trumped" the rights of states to invoke immunity under customary international law. Although the case regards a civil suit, it should be noted that the concept of individual responsibility for crimes against international law also seems to extend to the civil responsibility of perpetrators.[155] And even though it is a case involving state immunity, not head of state immunity, it can still be applied since it is a conceptual question between immunity and *jus cogens*.[156] The status and conclusions of the current practice is also confirmed in the legal doctrine. Bassiouni, even though a supporter of the theory that *jus cogens* "trumps" over head of state immunity, recognizes that in most cases impunity has been allowed for *jus cogens* international crimes.[157] In conclusion, it seems hard to find any evidence for this theory as rationale for removal of functional immunity for former heads of state in case of serious international crimes.

3.3.4.3 International crimes are implied waivers of funtional immunity?

The theory of implied waiver says that the serious international crime in itself implies that the head of state waives the normally afforded functional

[154] *Al-Adsani v. United Kingdom*, 34 EHRR 273 (case no 11) (2001); 123 ILR 24.
[155] Van Alebeek, *supra 4*, p. 216.
[156] *Ibid*, p. 319.
[157] Bassiouni, *supra 2*, p. 238.

immunity. Essentially, the criminal acts are not official acts since the state has no authority to violate *jus cogens* norms.[158] In this way, it combines the previous two theories discussed above, but the difference is that it does not rely on the argument that jus cogens norms "trumps" the functional immunity. Instead, it is an implied waiver of such immunity.

However, the theory has not received much support in the cases of national courts.[159] In the case *Pinochet No. 3*, Lord Goff, as the only Lord that voted against the extradition request by Spain, concluded that any waiver of immunity must be express. His argument was that the 1984 *Torture Convention* did not include an express waiver of immunity, and rejected that it was implied.[160] In the case *Jones v. Saudi Arabia*,[161] the weak status of this theory was confirmed by Lord Hoffmann when he stated that the "*theory of implied waiver […] has received no support in other decisions*".

3.3.4.4 Rules of extra-territorial jurisdiction displace functional immunity?

Another theory, brought forward by amongst others Akande and Shah, suggests that international crimes indeed can be official acts, but that the functional immunity is removed because a new rule permitting extra-territorial jurisdiction over the crime has developed.[162]

They argue that the denial of functional immunity in cases of international crimes is best explained by a development in international law which provides that the customary rule on functional immunity is in conflict with more recent rules of international law and the older rule must yield.[163] The newer law developed permit states to exercise extraterritorial jurisdiction in relation to international crimes. In such circumstances, they argue, there will be a conflict between the later jurisdictional rule and the prior rule of

[158] Akande & Shah, *supra 60*, p. 829.
[159] *Ibid*, p. 829f.
[160] Bianchi, *supra 84*, p. 244.
[161] *Jones v. Saudi Arabia*, UKHL 26 (House of Lords, 2006).
[162] Akande & Shah, *supra 60*, p. 839.
[163] *Ibid*, p. 840.

immunity so that the two cannot be applied simultaneously.[164] They express it as follows:

"Where the application of the prior immunity would deprive the subsequent jurisdictional rule of practically all meaning, then the only logical conclusion must be that the subsequent jurisdictional rule is to be regarded as a removal of the immunity."[165]

They argue that these principles constitute the best explanation for the decision in *Pinochet No. 3*, since most of the Lords concluded that granting functional immunity to Pinochet would be inconsistent with those provisions of the 1984 *Torture Convention* which accords universal jurisdiction for torture. The same argumentation was held by Lord Phillips:

"International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that State immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. [...] Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity".[166]

The theory sounds appealing. However, as critique against this theory, one could argue that it requires that states can exercise universal jurisdiction, which in itself can be questioned. Under the principle of universality, in the absence of other grounds for jurisdiction, all states have jurisdiction to try certain international crimes in their domestic courts.[167] The rationale is that some crimes, such as *jus cogens* international crimes, are particularly offensive and directed against the international community as a whole. This is argued to entail a right to prosecute those responsible regardless of where and against whom the crimes were committed, as illustrated by the Italian Supreme Military Tribunal in the 1950 *General Wagener* case[168]: "*The solidarity among nations, aimed at alleviating in the best possible way the*

[164] *Ibid*, p. 841.
[165] *Ibid.*
[166] *Ibid*, p. 846.
[167] Shaw, *supra 3*, p. 470.
[168] *General Wagener* case, Rivista Penale II, 753 (Supreme Military Tribunal, 1950).

horrors of war, gave rise to need to dictate rules which do not recognise borders, punishing war criminals wherever they may be."[169]

However, the concept of universal jurisdiction, and its limits, is debated and controversial. Beigbeder has expressed it as: "*Universal jurisdiction is more a desirable objective than a reality*."[170] Several other scholars argue that universal jurisdiction only exists when states have agreed to the exercise of such jurisdiction, for example in an international agreement. [171] That would explain the result of the decision of the Lords in *Pinochet No. 3* since they heavily relied on the 1984 *Torture Convention* to reach their conclusion.

But there has been made efforts to bring clarity to the matter of universal jurisdiction . In 2001, under the lead of Professor Bassiouni, a group of leading international legal scholars drafted *The Princeton Principles on Universal Jurisdiction*[172] with the purpose to "*advance the continued evolution of international law"* and to "*clarify and bring order the area of prosecutions for serious crimes under international law in national courts based on universal jurisdiction*". Principle 1(1) state:

"For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."

The crimes suggested to have universal jurisdiction are enlisted in principle 2(1) and include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture, i.e. crimes that also have been suggested as *jus cogens* international crimes. Further, principle 5 states the following:

"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

[169] Van Alebeek, *supra 4*, p. 211.
[170] Beigbeder, *supra 104*, p 63.
[171] Van Alebeek, *supra 4*, p. 211.
[172] Available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (2015-05-25).

responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[173]

This seems to correspond well with the view that *jus cogens* international crimes are under universal jurisdiction and also that their superiority removes the right to invoke immunity. However, the principles express both *lex lata* and *de lege ferenda*, and it is generally acknowledged that they only provide a useful guide and are of limited authority.[174] As stated above, the purpose of the principles were to "*advance the continued evolution of international law".*

In defence of the principle of universal jurisdiction, it has been argued that universal jurisdiction has existed for centuries. But the view of universal jurisdiction as an obligation, or at least a right, for all states to try a range of crimes in their domestic courts because of the gravity of the case, is a relatively new one. Prior to the Nuremberg processes, universal jurisdiction was only accepted for the crime of piracy, and the reason was most likely because of the specifics of the crime in itself, not because of any recognition as a crime against international law.[175] Thereafter, several multilateral conventions have been concluded in which the parties undertake to prosecute or extradite persons suspected of the crimes covered by the conventions, which are found within their territory. The 1949 *Geneva Conventions* provided the first examples where this principle of *aut dedere aut judicare* was expressed.[176] That might be seen as an expression for universal jurisdiction and a *jus cogens* obligation to prosecute or extradite. Another example with similar treaty-based universal jurisdiction, with an obligation to prosecute or extradite, is the 1984 *Torture Convention*.[177]

---

[173] The serious crimes under international law listed in Principle 2(1) include: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.
[174] Nwosu, *supra 34*, p. 84.
[175] Van Alebeek, *supra 4*, p. 212.
[176] The 1948 *Genocide Convention* is based on territorial criminal jurisdiction.
[177] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS vol. 1465, p. 85. Entry into force on 26 June 1987. Available at: http://www.unhcr.org/49e479d10.html (2015-05-25).

However, even if there is an obligation upon the state party to act, there is no recognized obligation on third states to institute criminal prosecutions.[178] What about such third states not parties to the treaties? Art. 34 of the 1969 *Vienna Convention*[179] establish that a treaty is only binding for the parties to the treaty, and does not create either obligations or rights for a third state without its consent. Once again, it should be noted that only rules that are generally accepted by the international law community of states as a whole can become *jus cogens*. If becoming a party to a treaty is required for jurisdiction, this defies the principle of universal jurisdiction where, according to the definition, the seriousness of the crime alone should be sufficient to trigger jurisdiction. It can therefore be questioned whether treaties protecting *jus cogens* norms by criminalizing certain acts provide "true" universal jurisdiction. Instead, it is doubtful that violations of *jus cogens* norms automatically confer the right to exercise universal jurisdiction.[180] This corresponds to the view of the scholars who argue that universal jurisdiction only exists when states have agreed to the exercise of such jurisdiction by an international treaty.

In conclusion, universal jurisdiction has been asserted for an increasing number of human rights offences, but there is little practice to support this. Without a consistent practice, universal jurisdiction is only an academic aspiration, and not an established fact. And without evidence for the existence of universal jurisdiction, it is hard to support the theory of Akande and Shah suggesting a development in international law as an explanation to the non-applicability of functional immunity in cases of international crimes.

3.4 Conclusions

The *Arrest Warrant* case clearly confirms the customary rule of absolute personal immunity for serving heads of state. This immunity applies before

[178] Akande & Shah, *supra 60*, p. 835.
[179] *Vienna Convention on the Law of Treaties* signed at Vienna 23 May 1969. UNTS, vol. 1155, I-18232. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (2015-05-25)
[180] Akande & Shah, *supra 60*, p. 836.

national courts of foreign states irrespective of the gravity of the crime, i.e. even for serious international crimes. However, the personal immunity ceases when the head of state leaves office.

Functional immunity exists alongside personal immunity for serving heads of state and becomes relevant only when the head of state leaves office. Even though cases such as *Eichmann* and *Pinochet No. 3* seem to support a customary rule that functional immunity for former high state officials does not apply before foreign national courts in cases of serious international crimes, the outcome in these cases can be given different explanations. The Lords heavy reliance upon the 1984 *Torture Convention* in their conclusions in the *Pinochet No. 3* devalues the precedence of the case, and does instead provide for the explanation for the outcome. In the *Eichmann* case, the Supreme Court of Israel concluded that functional immunity normally would apply, but that it would not apply in that particular case. One cannot look away from any political influence on the outcome. Further, the theories on why the functional immunity should be removed in cases of international crimes before domestic courts are diverse among the legal scholars, and most of them can be rightfully questioned. Instead, the conclusion drawn by the author of this thesis is that functional immunity for former heads of state is in fact still intact, even for serious international crimes, and that it will only be removed between states when they agree too, by waiving it or by becoming a party to an international convention with such content.

4 Head of state immunity before international jurisdictions

4.1 Introduction

The Nuremberg Tribunal, recognizing the principles of individual responsibility and irrelevance of official capacity, was the first international effort to hold high-level officials accountable for their criminal actions.[181] Negotiations between the Allies during the summer of 1945 led to the *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, and on 8 August 1945 the *Charter of the International Military Tribunal*[182] (IMT) was adopted.[183] The criminal jurisdiction of the tribunal was defined in article 6 of the Charter and confined to three categories of offences: crimes against peace, war crimes and crimes against humanity. Article 7 of the Charter formulated the provision which described the irrelevance of official capacity:

"The official position of defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

This provision, called the Nuremberg formula, has served as a blueprint on the issue of individual criminal responsibility for all international tribunals to come.

4.2 The ICTY and the ICTR

After the International Military Tribunals of Nuremberg and Tokyo, it took almost half a century before the concept of international criminal courts was

[181] Beigbeder, *supra 104*, p. 3.
[182] *Charter of the International Military Tribunal*, 8 August 1945, UNTS, vol. 82.
[183] Schabas, W. A., *The International Criminal Court: A Commentary on the Rome Statute* (2010), *p. 5.*

revived.[184] In 1992, a Commission of experts established by the Security Council identified a range of war crimes and crimes against humanity that had been committed, and was continuing, during the war in Bosnia.

And in 1994, Rwanda requested assistance from the Security Council to prosecute the persons responsible for serious violations of international humanitarian law in Rwanda and neighbouring countries in 1994.[185] Triggered by theses grave violations of human rights, the *ad hoc* tribunals ICTY and ICTR were established in 1993 and 1994 by the UN Security Council, acting under Chapter VII of the *UN Charter*.[186] The purpose for the establishment of the Tribunals was to restore international peace and security in the concerned regions.[187]

The *ICTY Statute*[188] and the *ICTR Statute*[189] closely resemble each other, although the war crimes provisions reflect that the Rwandan genocide took place within the context of a purely internal armed conflict. The ICTY has jurisdiction over the crimes of genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions as well as war crimes committed in the territory of former Yugoslavia since January 1991.[190] The ICTR has jurisdiction over the crimes of genocide, crimes against humanity or serious

---

[184] Beigbeder, *supra 104*, p. 49.
[185] Shaw, *supra 3*, p. 190.
[186] *Charter of the United Nations*, UNTS, vol. 1, XVI. Adopted on 26 June 1945. Entered into force on 24 October 1945. Available at: http://www.un.org/en/documents/charter/ (2015-05-25)
[187] Relevant is Art. 39 of the *UN Charter*: "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*"
[188] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*. Adopted by Security Council resolution 808 (1993) of 25 May 1993. Updated version available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (2015-05-25)

[189] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*. Adopted by Security Council resolution 955 (1994) of 8 November 1994. Updated version available at: http://www.unictr.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf (2015-05-25).

[190] *ICTY Statute*, Art. 1-5.

violations of the laws of war committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.[191]

Both the ICTY and the ICTR contain identical provisions stating the irrelevance of capacity. They can be found in Art 7.2 of the *ICTY Statute* and Art 6.2 of the *ICTR Statute*:

"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."

The articles provide for criminal responsibility and the removal of immunities normally vested in heads of state under customary international law.

A justified question though is how a Tribunal established by the Security Council under Chapter VII can remove such immunities of heads of state? The answer is to be found in the *UN Charter*.[192] Art. 25 of the *UN Charter* state:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Further, under Art. 103, the obligations under the *UN Charter* prevail over other international obligations:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Consequently, since all state parties to the *UN Charter* (all UN members) must accept Security Council Resolutions and such resolutions prevail over other sources of international law, like the customary rules of head of state immunity, such immunities do not apply before the ICTY or the ICTR.[193] However, the provisions of the statutes of the ICTY and the ICTR stating the irrelevance of official capacity have not been applied in that many cases, but their importance is none the less very significant.

[191] *ICTR Statute*, Art. 1-4.
[192] Van Alebeek, *supra 4*, p. 277.
[193] Nwosu, *supra 34*, p. 272.

4.2.1 Prosecutor v. Jean Kambanda

On October 19, 2000, Jean Kambanda, the former prime minister of Rwanda[194] was sentenced in the appeals chamber of the ICTR to life imprisonment for his involvement in the genocide and crimes against humanity against the Tutsi in Rwanda in 1994.[195] The judgement marks the first time that a head of government has been convicted of genocide.[196]

When Kambanda was charged, he pleaded guilty to all of the six charges against him.[197] He never invoked immunity and never questioned the jurisdiction of the ICTR. After a first conviction by the trial chamber on 4 September 1998, Kambanda filed an appeal on several grounds, but immunity was not one of them.[198] Kambanda was denied a new trial, but the appeals chamber tried the appeal. Since Kambanda never invoked immunity, it was never addressed by the appeals chamber either.

As the first case in which a former head of government has been convicted of genocide, it stands as a landmark against impunity for serious international crimes.[199]

4.2.2 Prosecutor v. Slobodan Milosevic

In the case *Prosecutor v. Milosevic,*[200] the question of head of state immunity was tried for the first time before the ICTY. Milosevic had been arrested 1 April 2001 in Belgrade by local authorities and transferred to the ICTY in the Hague on 29 June 2001. He was originally indicted for war crimes and crimes against humanity, but other indictments were added later, including a charge of genocide.[201]

---

[194] Jean Kambanda was the prime minister of Rwanda from 8 April 1994 to 17 July 1994.
[195] *Prosecutor v. Jean Kambanda*, ICTR-97-23-DP.
[196] Swaak-Goldman, O., *Kambanda v. Prosecutor. NO. ICTR 97-23-A*, AJIL, vol. 95, No. 3 (Jul., 2001), p. 656.
[197] *Ibid.*
[198] The grounds were that he was not defended by the counsel of his choice, that he had been unlawfully detained, the validity of the plea agreement, that he did not get a reduction of the sentence when he pleaded guilty, that the judgement did not specify a separate sentence for each count in the indictment and that the sentence was excessive.
[199] Swaak-Goldman, *supra 196*, p. 659.
[200] *Prosecutor v. Slobodan Milosevic*, IT-02-54.
[201] Beigbeder, Y., *International Criminal Tribunals: Justice and Politics*, p. 62.

Milosevic was head of state from 15 July 1997 to 6 October 2000, and the first indictment was issued on 22 May 1999, i.e. while Milosevic was still the serving president of the Federal Republic of Yugoslavia (FRY). The issue was never raised whether Milosevic as serving head of state was entitled to personal immunity, because when he was transferred to Hague to stand trial, he was no longer in office. Therefore, Milosevic stated that the ICTY did not have jurisdiction over him as a former head of state since he was entitled to invoke functional immunity. In response, the Trial Chamber of the ICTY stated:

"There is absolutely no basis for challenging the validity of article 7, paragraph 2, which at this time reflects a rule of customary international law. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in article 7 of the Nuremberg Charter and article 6 of the Tokyo Tribunal Charter. The customary character of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law."

However, Milosevic died of a heart attack on 11 March 2006 before the completion of the trial. Even so, along with the case *Prosecutor v. Kambanda*, the case must still be regarded as a decisive precedent on the irrelevance of official capacity and non-applicability of head of state immunity before an international criminal tribunal, established by the Security Council under Chapter VII. [202]

4.2.3 Prosecutor v. Radovan Karadzic

On 25 July 1995, the ICTY issued an indictment and arrest warrant against Radovan Karadzic,[203] the former president of the Serbian Republic, for genocide, crimes against humanity and violations of the laws or customs of war. He was arrested by Serbian police and surrendered to the ICTY on 30 July 2008.[204] He pleaded not guilty to the charges. Karadzic has not invoked head of state immunity, but has instead claimed that an agreement was reached between him and the U.S. negotiator Richard Holbrooke during the Dayton peace talks in November 1995. The content of the agreement was

[202] Van Alebeek, *supra 4*, p. 283.
[203] *Prosecutor v. Radovan Karadžić*, IT-95-5/18.

that Karadzic would not be prosecuted by the ICTY in exchange for completely withdrawing from public life.[205] The Trial Chamber dismissed his arguments and held that even if such an agreement existed Holbrook would not have acted with the authority of the Security Council and that Holbrook, as a third party, could not promise immunity years prior to Karadzic's transfer to the ICTY.[206] Further, the ICTY stated that there is no provision in the Statute that excludes any specific individual from the jurisdiction of the court.

The closing arguments took place from 29 September until 7 October 2014. Although the outcome of the case is not yet decided,[207] it is apparent that the ICTY does not regard functional immunities of former heads of state as a bar to its jurisdiction.

4.3 Special Court for Sierra Leone (SCSL)

The SCSL was established in 2002 pursuant to Security Council Resolution 1315 (2000),[208] The background was that the government of Sierra Leone had requested the UN to establish an international court to prosecute those responsible for the serious violations of international humanitarian law that had taken place in the Sierra Leone civil war (1991-2002). The SCSL was established with the purpose to prosecute those persons who had the greatest responsibility for the human rights violations.[209] Just like the ICTY and the ICTR, the SCSL has an article stating the irrelevance of official capacity, inspired by the Nuremberg formula. Article 6(2) provides:

---

[204] Cassese, *supra 47*, p. 97.
[205] *Ibid.*
[206] *Ibid.*
[207] The judgement is expected in October 2015. Case updates found at: http://www.icty.org/cases/party/703/4 (2015-05-25)
[208] Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315.
[209] See Art. 1(1) of the SCSL Statute, which in its first paragraph state: "*The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.*". Available at: http://www.rscsl.org/Documents/scsl-statute.pdf (2015-05-25).

"The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

The SCSL is often referred to as a hybrid court. A difference with the SCSL, compared to the ICTY and ICTR, is that the powers of the SCSL are not enhanced through a Chapter VII resolution.[210] Instead, it is "*a treaty-based sui generis court of mixed jurisdiction and composition*".[211] The legal basis of the Court is the *Agreement on the Establishment of a Special Court for Sierra Leone*.[212] This critical difference compared to the *ad hoc* tribunals would become one of the main issues regarding the head of state immunity of Charles Taylor in the case *Prosecutor v. Taylor,*[213] discussed below.

4.3.1 Prosecutor v. Taylor

When the SCSL issued an indictment and arrest warrant for Charles Taylor in March 2003, he was the serving head of state of Liberia.[214] Taylor resigned as head of state in August 2003. He was arrested and transferred to the SCSL in November 2006.

Taylor filed an application and objected to the indictment and the arrest warrant on the ground that he was entitled to head of state immunity from the jurisdiction of the SCSL.[215] He argued that the indictment was invalid since the *Arrest Warrant* case had established that serving heads of state enjoy absolute immunity, and that the SCSL did not have such Chapter VII powers which would allow exceptions to such immunities.[216] However, as can be recalled from the *Arrest Warrant* case, the ICJ in its *obiter dictum* also stated in the list of exceptions to personal immunity, in particular that

[210] Van Alebeek, *supra 4*, p. 285.
[211] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UNDoc.S/2000/915.
[212] *Agreement Between The United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*. Available at: http://www.rscsl.org/Documents/scsl-agreement.pdf (2015-05-25)
[213] *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I.
[214] Van Alebeek, *supra 4*, p. 285.
[215] *Ibid*, p. 287.
[216] *Prosecutor v. Taylor*, para. 6.

"*certain international courts*" still may have jurisdiction.[217] Is the SCSL such an international Court?

The application of Taylor was referred to the appeals chamber of the SCSL, which concluded that the sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal tribunal or court.[218] The SCSL stated that "*there is no reason to conclude that it should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State*".[219] The SCSL further stated that there is no support in state practice that international law grants immunities in relation to international courts and found that the jurisdiction of the SCSL is similar to that of the ICTY, the ICTR and the ICC, also when it regards the personal immunity of a head of state.[220] Consequently, the SCSL dismissed Taylor's application, revoked the head of state immunity and sentenced him to life imprisonment.

4.4 Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) was established by the UN Security Council through Resolution 1757,[221] which was passed under Chapter VII of the *UN Charter*. Originally STL was meant to be a hybrid criminal court, like the SCSL, but because of political considerations it was instead created by the Security Council.[222]

The jurisdiction of the Tribunal is specified to persons responsible for attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, and specifically to persons responsible for the attack on 14 February 2005 resulting in the death of the former Lebanese prime minister Rafik Hariri and death and

[217] *Arrest Warrant* case, para. 61.
[218] *Prosecutor v. Taylor*, para. 51.
[219] *Ibid*., para. 41.
[220] *Ibid.*
[221] UN Security Council Resolution 1757 (2007), S/RES/1757. Available at: http://www.stl-tsl.org/en/security-council-resolution-1757 (2015-05-25)
[222] Beigbeder, *supra 201*, p. 174.

injuries of other persons. The jurisdiction can be extended by the UN and Lebanon with the consent of the Security Council.[223]

The Statute has some features in common with the statutes of the other *ad hoc* tribunals, ICTY and ICTR, but also some major differences.[224] Art. 3 of the Statute of the STL contain provisions on individual criminal responsibility, but the Statute does not contain any provision that removes immunities. It is therefore uncertain how this would be handled by the STL.[225] However, at this writing, there are no cases involving heads of state before the STL.

4.5 Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2004 in cooperation with the UN. However, it is a hybrid national-international court within the judiciary system of Cambodia with a majority of Cambodian judges.[226] The Court was established by a Cambodian law[227] to bring senior leaders and those most responsible to trial for crimes and violations of Cambodian and humanitarian law committed during the period from 17 April 1975 to 6 January 1979.[228] In Art. 29 of the law, the irrelevance of official capacity is stated:

"The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."

However, since it is a Cambodian court trying only Cambodian citizens, questions of international immunities will not arise.[229] For that reason, the EEEC will not be discussed further.

---

[223] *Ibid*., p. 175.
[224] *Ibid*., p. 176.
[225] Nwosu, *supra 34*, p. 377.
[226] Beigbeder, *supra 201*, p. 150.
[227] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). Available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (2015-05-25)
[228] Art. 1of the law establishing the EEEC.
[229] Nwosu, *supra 34*, p. 345.

4.6 Analysis

The *Milosevic* case and the *Karadzic* cases of the ICTY, and the *Kambanda* case of the ICTR show that the jurisdiction of international criminal tribunals established by the Security Council under Chapter VII of the *UN Charter* render head of state immunity inapplicable, be it functional or personal immunity. However, it has been argued that a provision concerning the irrelevance of official capacity for the responsibility of the accused is not enough to remove personal immunity, only functional immunity.[230] It has been questioned whether the ICTY and the ICTR have jurisdiction to indict serving heads of state since the Statues do not provide that personal immunity does not apply.[231] Van Alebeek argues that the personal immunity of heads of state applies *erga omnes*, also before the ICTY and the ICTR, as opposed to the personal immunity of diplomats which only applies between the receiving and transit states. Other scholars argue that personal immunity in no case applies before international tribunals, such as the ICTY and ICTR, and that the law and practice of those tribunals support this.[232] In the words of Schabas:

"To the extent that there is no immunity for a Head of State before the ad hoc tribunals, this can only be by implication. Justification for such an implication is found in the fact of the establishment of the tribunals by the United Nations Security Council. [Personal] immunity applies to relations between States, and is not relevant when a United Nations-created tribunal is involved".[233]

The latter conclusion seems a lot more feasible. The resolutions by which ICTY and ICTR were established give them an authority to set aside rules that would apply before a domestic court. After all, personal immunity is only a rule under customary international law. Since Security Council resolutions issued under Chapter VII of the *UN Charter* prevail over other

[230] Van Alebeek, *supra 4*, p. 277.
[231] A comparison can be made with Art. 27(2) of the Rome Statute which explicitly states that personal immunity does not apply. The Statutes of ICTY and ICTR does not have similar provisions.
[232] Bassiouni, *supra 2*, p. 95. ; Schabas, *supra 183*, p. 450.
[233] "Sovereign" was substituted by "Personal" by the author to keep the language in the thesis coherent.

sources of international law, it is the interpretation of this author that personal immunities afforded to heads of state cannot apply before the ICTY or the ICTR.

The situation is more complex regarding the jurisdiction of the SCSL and the question of personal immunity, as illustrated by the case *Prosecutor v. Taylor*. The question was whether the issuance of the indictment and circulation of the warrant for Taylors arrest was allowed since Taylor at the time was the serving head of state. The answer from the SCSL was 'yes'. But the judgement has been criticized. It is apparent that the SCSL is an international court; it was established through the UN and is not part of Sierra Leone's judicial system. However, it might still be held that it does not have jurisdiction over persons entitled to personal immunity.[234] The argument is that an international court may only have the power to exercise jurisdiction over serving heads of state under certain conditions. Such conditions would include situations when the home state of the national has accepted the Courts jurisdiction or when the Court has been given Chapter VII powers by the Security Council, either prior to or subsequent to the establishment.[235] In the lack of such a condition, the personal immunity is absolute, also before an international court.[236] In that sense, the SCSL is different compared to the ICTY and the ICTR since they are established by the Security Council under Chapter VII.

In this author's opinion, there is no valid ground to argue, as the SCSL did, that it has the same powers as the ICTY and the ICTR just because it is established in cooperation with the UN. The similar wording of the articles regarding irrelevance of official capacity does not determine whether personal immunity applies or not. The ICTY and the ICTR were established by the Security Council acting under Chapter VII, whereas the SCSL is a treaty based international court. The necessary connection is missing between the Security Council and the SCSL, through Art. 25 and Art. 103 of

[234] Van Alebeek, *supra 4*, p. 289f.
[235] *Ibid*, p. 290.
[236] *Ibid.*

the *UN Charter*, which is required to remove customary rules of head of state immunity afforded to serving heads of state. The problems in this case were that the indictment was issued while Taylor was still head of state. Despite the judgement, it is still unclear whether the SCSL has jurisdiction over a serving head of state. In the words of Schabas:

"It may be that Taylor had no claim to [personal] immunity before the Special Court, but this is not the consequence of Article 6(2) of its Statute".[237]

However, when Taylor was transferred to the SCSL, he was no longer the serving head of state. Perhaps all this could have been avoided if the SCSL had cancelled and issued a new indictment? There is no doubt that a former head of state cannot invoke functional immunity before the SCSL.[238]

It has sometimes been argued that the international tribunals, and their practice, contribute to the development of a new customary international law, limiting the possibility of serving or former heads of state to invoke head of state immunity. This write however, does not agree with such conclusions, at least not regarding the ICTY and the ICTR. Customary international law does not arise out of UN Resolutions, but out of state practice and *opinio juris*. The capacity of the tribunals to remove immunities should instead to be seen as exceptions to customary international law powered by the Security Council acting under Chapter VII. The SCSL, however, is not established under Chapter VII, and because of that it would possibly be easier to recognize the practice of the SCSL as contributing to the development of customary international law.

4.7 Conclusions

Both personal and functional immunity for heads of state are removed before the jurisdictions of the ICTY and ICTR. The reason for this is the power vested in them through the Security Council acting under Chapter VII

[237] Schabas, *supra 183*, p. 450. "Sovereign" was substituted by "Personal" by the author to keep the language in the thesis coherent.
[238] Van Alebeek, *supra 4*, p. 285.

of the *UN Charter* in order to maintain or restore international peace and security.

There is no question that functional immunity of former heads of state is no bar to the jurisdiction of the SCSL. The rationale behind functional immunity is that the crime is committed by the state, not the individual. The provision in the SCSL Statute affirming individual responsibility and irrelevance of official capacity ensures this. However, it is questionable whether the SCSL made the right decision when it concluded that personal immunity is not a bar to its jurisdiction. As a hybrid court without the "Chapter VII-powers", it does not have the same authority as the ICTY and the ICTR.

Although the STL is an *ad hoc* tribunal established by the Security Council, its Statute does not contain a provision that can be construed as to remove immunities for former or serving heads of state. It is therefore uncertain how it would be handled by the STL in case the situation came up.

Finally, as illustrated by the EEEC, the question of international immunities of heads of state will not arise in cases where nationals are being tried by a national court, even if the court to some extent has been established with the cooperation of the UN.

5 Head of state immunity and the International Criminal Court

5.1 Introduction

As was explained in the introduction of this thesis, the establishment of the ICC led to high expectations for the future of humanitarian rights and international justice through the exercise of criminal jurisdiction. Although the creation of the *ad hoc* tribunals ICTY and ICTR had shown that those responsible for serious international crimes could be brought to justice, it would likely not be possible to establish similar tribunals in every possible international situation. Unlike the ICTY and the ICTR, which were based on Security Council Resolutions under Chapter VII under the *UN Charter*, the ICC is based on a multilateral treaty, the *Rome Statute*.

The establishment of the ICC had been an extensive process. The first serious efforts towards a permanent international criminal court were initiated in 1926 when the AIDP and ILA jointly created a draft statute on the establishment on a permanent international criminal court.[239] It was presented to several European parliaments and the League of Nations, but because of the political differences and the following Second World War, there was no conclusive result. After the Second World War, and the adoption of the Nuremberg Principles in 1950, the UN General Assembly instructed the ILC to make preparations for a permanent international court.[240] But once again, the work was futile. Because of the Cold War and difficulties in agreeing upon a definition of the crime of aggression, the international unity required for the establishment of a permanent international criminal court was impossible to achieve, and the work was suspended in 1954. It took until the 1990's before any serious progress was

[239] Bassiouni, M. C., *The Legislative History of the International Criminal Court* (2005), p. 24.
[240] *Ibid*, p. 55.

made in this process.[241] The horrors that were unveiled at the *ad hoc* tribunals ICTY and ICTR also came to remind the international community of the need for a permanent international criminal court. The ILC was instructed by the UN General Assembly to continue its work, which finally culminated in the 1998 *UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, also called the Rome Conference.[242]

At the Rome Conference some issues proved difficult to solve because of their political nature. Such issues were the specifics of the crimes, the scope of the Court's jurisdiction as well as the role of the Security Council.[243] But despite these difficulties the *Rome Statute* was eventually adopted on 17 July 1998 by 120 states, and finally entered into force on 1 July 2002, after the ratification by 60 states. Within a year, the ICC was fully operational.[244] This marked a milestone in international criminal law.

In accordance with the *Rome Statute*, Art. 11, the Court has only jurisdiction over events that took place after the entry into force of the statute, i.e. after 1 July 2002. This main rule of non-retroactivity of treaties is also confirmed by Art. 28 of the 1969 *Vienna Convention*.[245] Also, the *Rome Statute*, like all international treaties, is only binding upon its parties. This principle, that a treaty does not create either obligations or rights for a third state without its consent, is stated in Art. 34 of the 1969 *Vienna Convention*. The success of the ICC is therefore reliant upon a broad support among states. And since the *Rome Statute* is treaty-based and only binding upon the contracting states, the question is how this affects the jurisdiction of the ICC?

In this chapter, the thesis will investigate the status of immunities afforded to heads of state of both parties and non-parties to the *Rome Statute*. But to

---

[241] *Ibid*, p. 62.
[242] *Ibid*, p. 75.
[243] Schabas, *supra 183*, p. 17.
[244] *Ibid*, p. 1.
[245] 1969 *Vienna Convention on the Law of Treaties*, *supra 132*. Art. 28: "*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*."

understand the question of immunity, it is important to give a brief introduction to other aspects of the Court. It is not within the scope of this work to analyse the function of the Court, but a brief presentation of the crimes within the jurisdiction of the Court, the Court's jurisdiction, and the principle of complementarity is essential for understanding the concept of head of state immunity before the ICC.

5.2 Crimes within the jurisdiction of the Court

The crimes within the jurisdiction of the Court are described as "*the most serious crimes of concern to the international community as a whole*", both in Art.5 and in the preamble to the *Rome Statute*. Art. 5 states that the Court has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and aggression.

5.2.1 The crime of genocide

Genocide is covered in Art. 6 of the *Rome Statute* and defines genocide as "*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"*. There was not much controversy regarding the crime of genocide during the preparatory process. The definition included in Art. 6 is materially identical to Art. II of the 1948 *Genocide Convention*.[246] The Convention reflects customary international law, and during the Rome Conference there was a consensus among states to use the widely accepted definition of the crime.[247]

5.2.2 Crimes against humanity

The definition of crimes against humanity is included in Art. 7 of the Statute. The inclusion of crimes against humanity might be viewed as the implementation of human rights norms in the *Rome Statute*. An agreement on the definition proved to be difficult to achieve during the drafting process, although it was never questioned whether crimes against humanity

[246] Schabas, *supra 183*, p. 121.
[247] Ibid, p. 122.

should be included in the Statute.[248] The requirements of the crime are that it should be a "*widespread or systematic attack*" and that it should be "*directed against any civilian population*" and the perpetrator should have "*knowledge of the attack*". The definition in Art.7 differs from the definition of the crime in the statutes of the ICTY and ICTR, first and foremost since the definition explains that the crime can be committed in time of peace as well as in time of war.[249]

5.2.3 War Crimes

War crimes are defined in Art. 8 of the Statute. Many of the crimes listed in Art. 8 can cover certain isolated acts, and investigating and prosecuting such acts are not within the scope of the Court. Therefore, it is stated that the Court shall have jurisdiction in respect to war crimes "*in particular when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes*". Art.8 refers to the war crimes of the 1907 *Hague Convention*, the four 1949 *Geneva Conventions* and the 1977 *Additional protocols I and II*.[250] The novelty of the *Rome Statute* was that for the first time war crimes committed in a non-international armed conflict was codified. Further, new crimes such as the recruitment of child soldiers and attacks on peace keepers were recognized. [251] In this sense, the Rome Stature is a progressive development of international criminal law.

5.2.4 Aggression

The crime of aggression is included in Art. 8 *bis* of the Statute, a result of amendments to the *Rome Statute* adopted at the 2010 Kampala Review Conference.[252] During the Rome Conference, significant controversies had arisen concerning the crime of aggression, which had resulted in a declaration that the Court shall "*exercise jurisdiction over the crime of aggression once a provision is adopted*". By the adoption of the definition

[248] Schabas, *supra 183*, p. 141.
[249] *Ibid*, p. 143.
[250] *Ibid*, p. 195f.
[251] *Ibid*, p. 195.

of aggression, "*the most important gap in the text of the Rome Statute is now filled*". [253]

Art. 8 *bis* defines the crime of aggression. The crime can only be performed by a person in a position effectively to exercise control over or to direct the political or military action of a state, who was involved in the planning, preparation, initiation or execution of the act of aggression. The act in itself must amount to an act of aggression in accordance with the definition contained in General Assembly Resolution 3314,[254] and it must, by its character, gravity and scale, constitute a manifest violation of the *UN Charter*. This ensures that only illegal use of force can be subject to the jurisdiction of the Court and that lawful use of force, such as self-defense and Security Council authorized force, is excluded.[255]

However, the Court will not be able to exercise jurisdiction over the crime of aggression before two thirds of the parties to the Statute have taken a decision to activate the jurisdiction, and not before 1 January 2017.[256]

5.3 Jurisdiction

The group of articles governing the jurisdiction of the Court caused a great deal of debate during the entire preparatory process of the *Rome Statute*. The reason is that the articles address the fundamental issue of what restrictions should be imposed on the sovereignty of the state parties, as well as the function of the Security Council.[257]

---

[252] Politi, M., *The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead*, JICJ, 10 (2012), p. 267.
[253] *Ibid.*
[254] UN General Assembly resolution 3314 (XXIX) of 14 December 1974.
[255] http://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/ (2015-05-25)
[256] *Ibid.*
[257] Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article -, Second Edition* (2008), p. 340.

5.3.1 Preconditions to the exercise of jurisdiction

The ICC cannot exercise universal jurisdiction, which was the original purpose by a clear majority of the states during the Rome Conference.[258] Instead, the situations in which the Court has jurisdiction are limited.

Art. 11 provides that the Court has jurisdiction with respect to crimes committed after the entry into force of the Statute, i.e. after 1 July 2002. Also, if a state joins the Court after 1 July 2002, the Court has only jurisdiction after the Statute entered into force for that state, unless the state accepts the jurisdiction of the Court for the period before it became a contracting party. And Art. 12(1) provides that a state which becomes a party to the Statute, thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art. 5.

There are two, well-established principles that determine when the ICC has jurisdiction. First, Art 12(2)(a) provides that the Court may exercise jurisdiction if the crime took place in the territory of a state party or in the territory of a non-party state accepting the jurisdiction of the Court. This principle of territorial jurisdiction is universally accepted in international criminal law and can be found in many treaties and conventions.[259] If a crime is committed in a member state by a national of a non-party state, the Court will be able to exercise jurisdiction. In other words, the nationality of the offender is irrelevant.[260]

Secondly, Art. 12(2)(b) provides that the Court may exercise jurisdiction if the accused of the crime is a national of a state party or a national of a non-party state accepting the jurisdiction of the Court. The principle of active personality jurisdiction is well established in the domestic law among a majority of states.[261] In the context of international criminal law, the principle is universally accepted and by state practice and *opinio juris* a rule

[258] Schabas, *supra 183*, p. 283.
[259] Triffterer, *supra 257*, p. 340.
[260] Schabas, *supra 183*, p. 285.
[261] *Ibid*, p. 286.

customary law.[262] In case a national of a member state commits a crime in a non-member state, the Court will be able to exercise jurisdiction. In other words, the Court has in this sense extra-territorial jurisdiction.

Further, Art. 12(3) declares that a non-state party can accept the jurisdiction of the Court on an *ad hoc* basis without becoming a party to the *Rome Statute*. The prerequisite is that the crime was committed in that state's territory or by one of its nationals.[263] This possibility was not controversial during the Rome Conference but has since then been criticized, especially by the U.S.[264] The concern was that a non-state party would be able to pick a particular incident over which it would grant the ICC jurisdiction, but that the actions of the non-state party itself was outside the jurisdiction of the Court. The argument for the criticism was that the rule easily could be abused. [265] It is still to some extent debated how this rule shall be interpreted, but the prevailing opinion seems to be that an acceptance of the Courts jurisdiction is made regarding a whole situation, not a particular crime.[266]

5.3.2 Exercise of jurisdiction

If any crime listed in Art. 5 occurs in any of those situations listed in the previous chapter, Art. 13 triggers the jurisdiction by providing that a state party may refer the situation to the Prosecutor, or the Prosecutor may initiate an investigation *propio motu.*[267] Any referral by a state party to the Prosecutor must be in conformity with Art. 14, where the relevant rules are stated.[268] It should be noted that only state parties can trigger the Courts jurisdiction. There can be no *ad hoc* referrals by non-state parties, unless it concerns their own citizens or territory in accordance with the process

[262] *Ibid*, p. 286 and the *Case of the SS Lotus (France v. Turkey)*, Series A. No. 10 (Permanent Court of International Justice, 1927).
[263] Bassiouni, *supra 239*, p. 658.
[264] Schabas, *supra 183*, p. 288.
[265] An example used was that someone like Saddam Hussein could grant the ICC jurisdiction over the U.S. actions in Iraq, but that the actions of Iraq against its own people were outside the reach of the Court.
[266] Triffterer, *supra 257*, p. 560; Schabas, *supra 183*, p. 289; Bassiouni, *supra 239*, p. 84.
[267] The term *proprio motu*, which is used in the Statue, means on an independent initiative.
[268] See article 13(a) and article 14.

described above.[269] It is also important to note that any state party has this capacity, even though it is not directly involved in the situation. For the sake of effectiveness and independence of the Court, it is essential that the Prosecutor has the competence to independently initiate an investigation with respect to crimes within the Courts jurisdiction. This must be done in conformity with Art. 15, where the relevant rules are stated.[270]

However, Art. 13 also provides that the Court may exercise its jurisdiction with respect to situations that the Security Council, acting under Chapter VII of the *UN Charter*, refer to the Prosecutor. Unlike the situations of state party referral and independent initiative by the Prosecutor, there are no further rules in the *Rome Statute* dealing with Security Council referral.[271]

Once the Security Council has determined, in accordance with Chapter VII of the *UN Charter*, that a crime listed in article 5 has been committed, it may refer that situation to the Prosecutor. Chapter VII gives the Security Council power to act in "*the existence of any threat to the peace, breach of the peace, or act of aggression*".[272] Since the preconditions of Art. 12(2), i.e. a connection to the territory of a member state or the state membership of the accused, does not address conferral of jurisdiction by the Security Council, it must be presumed that those conditions do not have to be met.[273] This is however not stated explicitly in the Statute. However, it suggests that any crime listed in Art. 5 in theory could be referred to the Court by the Security Council, irrespective of where or by whom it was committed as long as the crime was committed after the entry into force of the *Rome Statute.* This is a position that has met fierce opposition.[274] There are, however, still some situations where the powers of the Security Council are limited. In the case *Prosecutor v. Tadic*,[275] the Appeals Chamber of the

[269] Triffterer, *supra 257,* p. 569.
[270] Article 15 provides the necessary safeguards against abuse of this function.
[271] Triffterer, *supra 257,* p. 293.
[272] *UN Charter*, Art. 39.
[273] Schabas, *supra 183*, p. 300.
[274] Van Alebeek, *supra 4*, p. 264. Especially the U.S. has criticized the scope of the Court's jurisdiction, although a permanent member of the Security Council.
[275] *Prosecutor v. Dusko Tadic*, IT-94-1-AR72, para. 28.

ICTY, which as we recall is also powered by the Security Council under Chapter VII, has noted "*[t]he Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be*". [276] That suggests that the Security Council perhaps cannot refer *any* situation to the Court.[277] Also, any referral by the Security Council must define the parameters of the situation to which it refers. As an example, which will be discussed below, the Security Council Resolution which directed the situation in Sudan to the ICC referred to "Darfur" which is only a regional province of the country. [278]

5.4 Complementarity

A fundamental issue during the drafting of the *Rome Statute* was the relationship between the Court and national courts since it concerned the sovereignty of the state parties to the Statute. The work resulted in the principle of complementarity, which is central to the philosophy of the Court. In fact, it is doubtful whether the *Rome Statute* could have been adopted without it.[279] In Art. 17, three factors determine if a situation is admissible to the Court: complementarity, *ne bis in idem* (double jeopardy) and the gravity of the case. The Court may not proceed with a case if any of these factors are present.[280] This thesis will not discuss *ne bis in idem* or the gravity of the case, but will instead discuss the principle of complementarity.

Already in the preamble, the *Rome Statute* provides that the Court "*shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern […] and shall be complementary to national criminal jurisdictions*".[281] The importance of the principle cannot be understated and it is referred to in several places in the Statute.[282] Complementarity means that the national jurisdiction of the state party has

[276] Triffterer, *supra 257,* page 569.
[277] *Ibid*, p. 574; Schabas, *supra 183,* p. 301.
[278] Security Council Resolution 1593, adopted on 31 March 2005.
[279] Schabas, *supra 183*, p. 336.
[280] *Ibid*, p. 340.
[281] *Rome Statute*, Art. 1.

primacy over the jurisdiction of the Court, and Art. 17 states that the Court may only assume jurisdiction when a state is unable or unwilling to genuinely carry out the investigation or prosecution. It can be pointed out that it is for the Court to decide whether these conditions are met, not the state party.[283] This test of "unable or unwilling" was a sensitive issue during the preparation of the Statute since some states feared that the Court might be passing judgement on national systems.[284]

In order to determine unwillingness, three factors are listed in Art. 17(2). A state is determined to be unwilling if the proceedings or decision not to prosecute are or were made to shield the person concerned, if there is an unjustified delay in the proceedings, or if the proceedings are or were not independent or impartially conducted. The aim is that a case shall be admissible to the Court in situations where a national justice system is trying to make it look as if an investigation and prosecution is underway or has taken place although that is not the case.[285] In order to determine inability, three factors are listed in Art. 17(3). A state is rendered unable to carry out an investigation and prosecution if the state is unable to obtain the accused, if the state is unable to obtain the necessary evidence and/or testimony, or if the state is unable to otherwise carry out its proceedings. These are situations when a state lacks the ability to investigate or prosecute, even when it is willing. It should be noted that inactivity of a state also would make a case admissible to the Court, even in cases where if it would not fall within the scope of unwillingness or inability.[286]

5.5 Head of state immunity at the ICC

As this thesis has shown, international criminal courts have been established in different situations. In a way, they can be looked upon as separate

[282] Besides the preamble, the complementary nature of the Courts jurisdiction is stated in amongst others Art. 1, 17 and 18.
[283] Cryer, R., Friman, H., Robinson, D., Wilmshurst, E., *An Introduction to International Criminal Law and Procedure, Third Edition* (2014), p. 128.
[284] Triffterer, *supra 257*, page 392.
[285] Schabas, *supra 183*, p. 340.
[286] *Ibid*, p. 341.

generations of international criminal courts. The first generation was the Nuremberg tribunal, which was the result of the four victorious powers wishing to prosecute and punish the major war criminals of the European Axis. The principle of irrelevance of official capacity has its origin in Art. 7 of the Nuremberg Charter. The second generation is the *ad hoc* tribunals ICTY and ICTR, established by the Security Council under Chapter VII of the *UN Charter*. The provisions stating the irrelevance of capacity were virtually identical to the provision in Nuremberg Charter. The third generation is the ICC, established by a multilateral treaty. Like the previous generations, it contains a provision regarding the irrelevance of official capacity.

5.5.1 Article 27

In many ways, Art. 27 represents the purpose of the *Rome Statute*. It is one of the clearest manifestations in the Statute of the determination expressed in the preamble *"to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes"*.[287] Art. 27 states:

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as 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.*

Although the wording of Art. 27 is similar to the wordings of Nuremberg charter and the Statutes of the ICTY and the ICTR, there are differences. The novelty was first and foremost the introduction of the second paragraph, which fulfils a different function than the first.[288] The first paragraph, which

[287] Para. 5 in the Preamble to the *Rome Statute*; Triffterer, *supra 257*, p. 786.
[288] Schabas, *supra 183*, p. 446.

denies a defence of official capacity, is derived from the Nuremberg Charter and is also similar to the ones found in the Statutes of the ICTY and the ICTR. The second paragraph, which had no precedent in international criminal law when it was introduced in the *Rome Statute*, contains a renunciation of the head of state immunity by the parties to the statute. [289] The differences will now be looked at in further detail.

5.5.1.1 Article 27(1)

As we can recall from previous chapters, the defence for functional immunity is that the crime is committed by the state, not the individual state official. By including a provision stating the individual responsibility and irrelevance of official capacity, such protection is effectively removed.[290] Hence, Art. 27(1) declares the removal of functional immunity before the Court, but was never an issue for much debate during the Rome Conference.[291] Similar provisions had been successfully included in the Nuremberg Charter and the Statutes of the ICTY and the ICTR and was well-established.[292] Although basically similar, Art. 27(1) did however differentiate itself somewhat from previous versions. It begins with a statement that the *Rome Statute* shall apply equally to all persons. This expresses one of the main purposes of the Statute, which is to proclaim that all persons committing a crime within the jurisdiction of the Court shall be individually responsible.[293] It puts some extra focus on and enforces Art. 25 which states the main provisions of individual criminal responsibility. Art. 27(1) further removes the official capacity as a defence to several named categories of state officials: heads of state or government, members of governments or parliaments, elected representatives and government officials. None of the previous articles in the Nuremberg Charter or statues of the ICTY or ICTR is as detailed. It ensures that the article applies to all

[289] *Ibid*.
[290] *Ibid*, p. 449.
[291] Triffterer, *supra 257*, p. 784.
[292] See *Prosecutor v. Milosevic* and *Prosecutor v. Radislav Krstic*, IT-98-33-A, para. 26.
[293] Triffterer, *supra 257*, p. 786.

state officials, including those who hold *de facto* authority.[294] Art. 27(1) also contains an elaborated version of the wording explaining that an official position cannot constitute a ground for reduction of the sentence.

By removing functional immunity, Art. 27(1) ensures that the Court will have jurisdiction over former heads of state of the state parties.

5.5.1.2 Article 27(2)

Art 27(2) addresses the personal immunity of serving state officials who are entitled to such immunity in accordance with customary international law, i.e. heads of state and government and foreign ministers.[295] The customary rule of absolute personal immunity is affirmed in the *Arrest Warrant* case where the ICJ entitled a serving foreign minister personal immunity. But the ICJ also concluded that serving state officials may be subject to "*certain international criminal courts, where they have jurisdiction*" and gave the ICC as an example.[296] State parties, by their ratification of the *Rome Statute*, have accepted the provisions included therein and have thereby also renounced their right to invoke personal immunity in respect of the crimes in Art. 5.[297] In the words of Schabas:

"*..there is no doubt that article 27(2) removes any plea of immunity from the relevant officials of State Parties to the Rome Statute*".[298]

From the above is it possible to conclude that Art. 27(1) removes the functional immunity of *former* senior officials of state parties, and that Art. 27(2) removes the personal immunity of *serving* senior officials of state parties. But how does Art. 27 apply in the case of non-party states?

5.5.1.3 Non-party states and Article 27

As previously stated, Art. 34 of the 1980 *Vienna Convention* provides that a treaty is only binding upon the parties to the treaty.[299] Since non-party states have not ratified the *Rome Statute*, they have not renounced their right to

[294] Schabas, *supra 183*, p. 448.
[295] *Ibid*, p. 449.
[296] *Ibid*; *Arrest Warrant* case, para. 61.
[297] Schabas, *supra 183*, p. 450.
[298] *Ibid.*

invoke immunity under Art. 27. But at the same time, the Security Council can refer situations involving non-party states to the Court under Chapter VII of the *UN Charter*. If a state official of a non-party state is entitled to invoke immunity according to customary international law, there would be a conflict between Art. 27 and international law. Under these circumstances, the question is whether Art. 27, as a provision of a multilateral treaty, can remove the functional or personal immunity of serving state officials of non-parties? Some leading scholars argue that it cannot do so, at least not regarding the personal immunity.[300] The principle that a treaty cannot set aside the rights of non-party states is central to such arguments.

However, other scholars argue for a contradicting customary international law that removes immunities of former and serving state officials before international criminal courts and tribunals in cases of international crimes.[301] If that is correct, and both Art. 27(1) and 27(2) reflect customary international law, there would not be a conflict. These very questions have been put to test in some cases before the ICC and those will be discussed in chapter 5.5.3 below.

5.5.2 Article 98

Immunities are also considered in Art.98 of the Statute. Under the *Rome Statute*, state parties have obligations to surrender accused persons to the Court and other forms of cooperation. Such obligations are stated in Part IX of the *Rome Statute* (Art. 86-102). Art. 98 states exceptions to such obligations. In Art. 98, the first paragraph covers international obligations in relation to immunities, and the second paragraph covers obligations in relation to international agreements:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State,

---

[299] See also Van Alebeek, *supra 4*, p. 264.
[300] Schabas, *supra 183*, p. 450; Van Alebeek, *supra 4*, p. 276.
[301] Cassese, *supra 55*, p. 865.

unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

5.5.2.1 Article 98(1)

Under customary international law, states have the obligation to respect the immunities of diplomats and other state officials, and the *Rome Statute* has the potential to conflict with such obligations.[302] Art. 98(1) provides that the Court cannot request a state party to cooperate if such cooperation would violate the personal immunity of a state official of a non-party state.[303] In case the Court agrees that the request is in conflict with such immunities belonging to a non-party state, it may apply to the state for a waiver.[304] It might be that the non-party state is under an obligation to cooperate under an international treaty, such as the 1948 *Genocide Convention*, and waives the immunity. It has also been argued that states are under an obligation to cooperate under the principle *aut dedere aut judicare*,[305] when it comes to serious international crimes.[306] It should be noted that Art. 98 is inapplicable to immunities of the requested state itself, since any state that becomes a party to the *Rome Statute* renounces any claim they may have to immunity before the Court.[307] That means that a head of state of a state party cannot rely upon Art. 98(1) as a bar for arrest and surrender when travelling to another state which is a party to the Statute. The question is whether a head of state of a non-party state is protected against arrest and surrender by Art. 98(1) when present in the territory of a state party? That issue was addressed

[302] Schabas, *supra 183*, p. 1037.
[303] Gaeta, P. , *Official Capacity and Immunities*, in: Cassese, A./Gaeta, P. /Jones, J. R. W. D., *The Rome Statute of the International Criminal Court: A Commentary, (2002), Vol. 2*, p.1000.
[304] Schabas, *supra 183*, p. 1039.
[305] See chapter 3.3.4.4.
[306] Schabas, *supra 183*, p. 1039.
[307] *Ibid*, p. 1040.

in the case *Prosecutor v. Al Bashir*, which will be discussed below in the chapter on cases.

5.5.2.2 Article 98(2)

Art. 98(2) states an exception to surrender an accused person if it would require the requested state to act inconsistently with its obligations under an international agreement, be it bilateral or multilateral.[308] During the Rome Conference the original intent was that an exception was required in relation to SOFA's (Status of Forces Agreements), which are agreements often used by states that allow military activity by foreign troops on their territory.[309] And since most SOFA's contain provisions governing the exercise of criminal jurisdiction over such troops, an exception in this context was deemed necessary. Since Art. 98(2) is not within the scope of the thesis, I will not address it further, but it will be briefly discussed below in chapter 6 regarding challenges to the ICC.

5.5.3 Cases

5.5.3.1 Prosecutor v. Al Bashir

The status of personal immunities of heads of state of non-party states in the event of a Chapter VII referral by the Security Council was tested in the case *Prosecutor v. Al Bashir*.[310] On 31 March 2005 the UN Security Council, acting under Chapter VII of the *UN Charter*, passed Resolution 1593[311] which referred the situation in Darfur, Sudan, to the ICC. A Resolution was necessary since Sudan is not a party to the *Rome Statute* (and had not accepted ICC's jurisdiction voluntarily). Thereafter, on 4 March 2009 and 12 July 2010, the Pre-Trial Chamber of the ICC issued arrest warrants against Omar Al-Bashir, the serving president of Sudan, on account of crimes against humanity, war crimes and genocide. Further, all state parties were sent a request for cooperation for the arrest and surrender of Al Bashir in accordance with Articles 89(1) and 91 of the Statute.

---

[308] *Ibid*, p. 1042.
[309] Schabas, *supra 183*, p. 1037.
[310] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.
[311] UN Doc. S/Res/1593 (31 March 2005).

The decision of the Pre-Trial Chamber held that Al Bashir's status as head of state was irrelevant, and was based on four conclusions. [312] First, it referred to the central aims of the *Rome Statute* to end impunity for the perpetrators of the most serious international crimes. Secondly, it stated that Article 27(2) applies to all people equally regardless of their position, even as head of state. Thirdly, it stated that customary international law rules establishing personal immunity is no bar to the Court for exercising its jurisdiction. Finally, it determined that the Security Council, in its referral, intended that any prosecution would take place within the framework of the *Rome Statute*.[313] The removal of immunity would thereby make it possible to determine the individual criminal responsibility of Al Bashir, and provide a possibility to prosecute him for the alleged crimes once he was arrested. This illustrates the view of the ICC that personal immunities of heads of state of non-party states is not a bar to its jurisdiction.

Another issue in this case arose after Al Bashir travelled to Malawi to participate in a summit of regional leaders on 14 October 2011. Malawi is a party to the *Rome Statute*, but did not arrest Al Bashir despite the request for cooperation circulated to all state parties by the ICC. In an explanation sent to the ICC, Malawi state officials explained that Art. 27 did not apply since Sudan was not a party to the *Rome Statute*, and that Al Bashir as serving head of state therefore was entitled to immunities and freedom from arrest and prosecution on Malawi territory.[314] As a response, the Pre-Trial Chamber condemned Malawi for the failure to comply with the request to arrest and surrender Al Bashir to the ICC.[315] This illustrates the view by the Court that the obligation to arrest leaders of non-party states set aside the customary rule of personal immunity which the state party normally is

[312] Schabas, *supra 183*, p. 451.
[313] Bullock, S., *Prosecuting President Al Bashir, and the short arm of justice*, DLJ 2013, Vol 25, p. 198.
[314] *Ibid*, p. 199.
[315] On 13 December 2011, Pre-Trial chamber I decided that the Republic of Malawi failed to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir during his visit on 14 October 2011. The decision was referred to the president for transmission to the United Nations Security Council

obligated to respect. It could be argued that this view directly contradicts the wording in Art. 98(1). Whether it does so will be discussed further below.

At this writing, Al Bashir is still not apprehended. Even so, the case is of great importance in order to determine how the ICC view its status and power to remove the personal immunity of heads of state of non-party states under a Chapter VII referral by the Security Council.

5.5.3.2 Prosecutor v. Gaddafi

The case *Prosecutor v. Gaddafi*[316] is in several ways similar to the Al Bashir case. The UN Security Council, acting under Chapter VII of the *UN Charter*, had referred the situation in Libya to the ICC by Resolution 1970.[317] On 27 June 2011, the Pre-Trial Chamber of the ICC authorised a warrant for the arrest of Muammar Gaddafi, the then serving president of Libya, which is not a party to the *Rome Statute*. By issuing the arrest warrant, the Pre-Trial Chamber determined that Art. 27(2) would be applicable to Gaddafi and effectively remove his right to invoke personal immunity, notwithstanding Libya's status as a non-state party to the *Rome Statute*.[318] In the decision, the Pre-Trial Chamber did not elaborate its reasoning on the issue of personal immunity, it merely made a reference to the decision in the Al Bashir case.

However, the death of Gaddafi on 20 October 2011 closed the door on any prosecution of Gaddafi at the ICC. Following his death, the proceedings were terminated on 22 November 2011. Still, as in the case with Al Bashir, this case also illustrates how the ICC looks upon its power to remove the personal immunity of heads of state of non-party states.

(UNSC) and to the Assembly of the States Parties (ASP) to take the necessary measures they deem appropriate. http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf (2015-05-25)

[316] *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11.

[317] UN Doc S/Res/1593 (26 February 2011)

[318] Wardle, P., *The Survival of Head of State Immunity at the International Criminal Court*, AILJ (2011), p. 182.

5.5.3.3 Prosecutor v. Gbagbo

The case *Prosecutor v. Gbagbo*[319] differentiates itself from the cases of Al Bashir and Gaddafi. On 23 November 2011, the Pre-Trial Chamber of the ICC issued a warrant for the arrest of Laurent Gbagbo, the serving president of Côte d'Ivoire. Gbagbo was transferred to the custody of the ICC on 30 November 2011. Although Côte d'Ivoire is a party to the *Rome Statute* today, it was not at the time of the arrest warrant.[320] However, Côte d'Ivoire had accepted the jurisdiction of the ICC on two previous occasions, on 18 April 2003, and on 14 December 2010.[321] The Prosecutor of the ICC was thereby authorized to exercise the *proprio motu* powers under Art. 12(3), in order to initiate an investigation. Further, such an acceptance of the jurisdiction of the ICC also makes Art. 27(2) applicable, thereby effectively revoking the immunity of Gbagbo under customary international law.[322] Consequently, by the acceptance of ICC's jurisdiction and Art. 12(3) of the Statute, in combination with the removal of private immunity under Art. 27(2), president Gbagbo's head of state immunity has been abrogated. The trial is scheduled to open on 7 July 2015.[323]

5.5.3.4 Prosecutor v. Kenyatta

In the case *Prosecutor v. Kenyatta*,[324] the president of the Republic of Kenya, Uhuru Kenyatta, was investigated for crimes against humanity in the context of the 2007-2008 post-election violence in Kenya. Kenya is a state party to the *Rome Statute*. On 31 March 2010, Pre-Trial Chamber had granted the Prosecution authorisation to open an investigation *proprio motu* in the situation of Kenya, and on 8 March 2011, Uhuru Kenyatta was summoned to appear before the Court.[325]

---

[319] *Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-1.
[320] Côte d'Ivoire ratified the *Rome Statute* on 15 February 2013.
[321] Wardle, *supra 318*, p. 187.
[322] *Ibid.*
[323] In accordance to the home page of the ICC: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/Pages/icc02110111.aspx (2015-05-25)
[324] *Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11.
[325] Case Information Sheet. Situation in the Republic of Kenya. The Prosecutor v. Uhuru Muigai Kenyatta. ICC-01/09-02/11. Available at: http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf (2015-05-25).

However, on 5 December 2014, the Office of the Prosecutor issued a public notice of withdrawal of the charges against Kenyatta.[326] The notice stated that the Prosecution withdraws the charges against Mr Kenyatta since the evidence had not improved to such an extent that Mr Kenyatta's alleged criminal responsibility could be proven beyond reasonable doubt. Following that, on 13 March 2015, the Trial Chamber of the ICC made public its decision to withdraw the charges against Kenyatta and terminate the proceedings.[327] Even so, this case also illustrates that Art. 27(2) applies against serving heads of state of state parties to the *Rome Statute*.

5.6 Analysis

The indictments and arrest warrants in the cases against Al Bashir and Gaddafi, as well as the condemnation of Malawi in the Al Bashir case, have all been criticized.[328] Some scholars agree with the outcome of the decision to issue the arrest warrants, but disagree with the reasoning of the Pre-Trial Chamber.[329] Other scholars disagree with the outcome as well, and argue that a serving head of state of a non-state party is entitled to personal immunity, also before the ICC.[330] The common denominator in their reasoning is that the ICC is based upon a treaty, the *Rome Statute*, which only can bind the contracting parties.

In the Arrest Warrant case, the ICJ stated in the *obiter dictum* that the customary rule of personal immunity does not apply before international criminal courts. Akande concludes that whether personal immunity applies depends on the nature of the Court, how it was established and if the state of the official to be tried is bound by the instrument establishing the tribunal,

[326] Information available at: http://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf (2015-05-25).
[327] *Ibid.*
[328] Schabas, *supra 183*, p. 451; Akande, D., *ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong*, EJIL: Talk, 15 December 2011. Available at: http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-longlast-but-gets-the-law-wrong/. (2015-05-25); Wardle, *supra 318*, p. 181.
[329] Akande, *supra 328*; Gaeta, P., *Does President Al Bashir enjoy immunity from arrest?* (2009), JICJ, p. 315.
[330] Van Alebeek, *supra 4*, p. 292; Schabas, *supra 183*, p. 451; Wardle, *supra 318*, p. 205.

not the mere fact that it is an international court. [331] Because the ICC is based on a multilateral treaty, he argues, the ICC is not such a certain international criminal court with power to remove personal immunities of non-party states. Fox points out that the *Rome Statute* is a treaty like all others and enjoys no superiority over other conventions.[332] The argument is that if two states cannot agree to remove the immunity of a third state, neither can sixty states.[333] In comparison, the Statutes of the ICTY and the ICTR were created by Security Council Resolutions. The Statutes and their provisions are therefore authorized by Chapter VII as a response to a threat to international peace and security.[334] Thereby, they become binding on all UN members and will therefore prevail over any obligations under customary international law.[335] Despite this, Wardle argues that even though the situations in Darfur and Libya were referred to the ICC by the Security Council acting under Chapter VII of the *UN Charter*, that is not sufficient to remove the personal immunity of serving heads of state. In order for the personal immunity of Al Bashir and Gaddafi to be removed, Resolutions 1593 and 1970 should have specified that explicitly.[336] On the other hand, Gaeta argues that personal immunity of customary international law does not apply to the ICC, even when the state is a non-party member.[337] In that respect, she agrees with the Court that the arrest warrant is not in conflict with the personal immunities of Al Bashir and Gaddafi.

However, in situations when the Security Council has identified a threat to international peace and security, does it really matter whether it establishes an *ad hoc* tribunal such as the ICTY and ICTR or makes a referral of the situation to the ICC to handle the situation? It seems reasonable that the power does not rest with the Court or Tribunal in itself, but that it rests with the Security Council and Chapter VII of the *UN Charter*. As previously concluded, a

[331] Akande, D., *International Law Immunities and the International Criminal Court*, (2004) AJIL Vol. 98 no. 3, p. 421.
[332] Fox, *supra 11*, p. 432.
[333] Bullock, *supra 313*, p. 206.
[334] See Art. 39 of the *UN Charter*.
[335] Wardle, *supra 318*, p. 196.
[336] *Ibid*, p. 197.
[337] Gaeta, *supra 329*, p. 315.

Security Council Resolution issued under Chapter VII has a higher hierarchy than international customary law (through the provisions of Art. 25 and Art. 103 of the *UN Charter*). Therefore, as with the statutes of the ICTY and the ICTR, a referral by the Security Council must be said to give the ICC the necessary tools to exercise its jurisdiction under the *Rome Statute* in the referred situation. That includes Art. 27, which means that the customary rules of head of state immunity do not apply before the ICC. If examined from that view, it is no longer relevant how the Court was created or whether the state is a party to the Statute.

And by using the same logic, then all parties to the *Rome Statute* are also under an obligation to cooperate with the ICC under Art. 89 of the *Rome Statute* and arrest and surrender indicted heads of state of non-party states present on their territory. If so, the exceptions stated in Art. 98(1) does not apply when a situation has been referred to the ICC by the Security Council under Chapter VII of the *UN Charter*. As concluded above, the obligation to follow Security Council Resolution requesting states to cooperate with the ICC has higher hierarchy than obligations to respect customary international law. And by that, one can conclude that it was correct of the Pre-Trial Chamber to condemn Malawi for not cooperating with the ICC and arrest Al Bashir during his visit.

5.7 Conclusions

It can be concluded that head of state immunity established by customary international law, which normally applies between states, can be set aside by a treaty like the *Rome Statute*. The functional immunity of former heads of state of state parties is effectively removed by Art. 27(1), and is consequently not applicable as a bar to the jurisdiction of the ICC.

Further, by ratifying the *Rome Statute*, a state also agrees to the removal of personal immunity of its head of state before the ICC. If the head of state commits a crime under the jurisdiction of the court, Art. 27(2) will not prevent the Court from exercising its jurisdiction. This is confirmed by the case *Prosecutor v. Kenyatta*, even though the charges against Kenyatta were withdrawn.

The same applies in cases when non-party states have accepted the jurisdiction of the Court. By doing so, the state revokes the functional and personal immunity of its head of state. This is confirmed in the case *Prosecutor v. Gbagbo*, and is as well acknowledged in the legal literature used for this thesis.

However, in cases where situations have been referred to the jurisdiction of the Court by the Security Council acting under Chapter VII of the *UN Charter*, the situation can be argued to be less clear. The cases *Prosecutor v. Al Bashir* and *Prosecutor v. Gaddafi* both support that personal immunity of a head of state of a non-party state is not a bar to the jurisdiction of the ICC under a referral by the Security Council. On the other hand, the arrest warrants against Al Bashir and Gaddafi have received a great deal of criticism, although some of the criticism regarded the reasoning and logic of the Pre-Trial Chamber more than the Arrest Warrant and non-applicability of the personal immunity in itself. In the humble opinion of this author, the Security Council's Chapter VII referral to the ICC should be as authoritative as the creation of an *ad hoc* tribunal, and by such remove any possibility to remove personal immunity. And despite the criticism, it must still be concluded that all cases illustrate that Art. 27(2) removes the personal immunity, even for heads of state on non-party states.

6 Final conclusions and reflections for the future

As this thesis has shown, customary international law provides that serving heads of state enjoy both personal immunity and functional immunity before national courts of other states, even for private acts. This absolute immunity of a serving state official is illustrated by the *Arrest Warrant* case. Former heads of state are no longer of importance for the function of the state and do not enjoy personal immunity and the entailing extensive protection against the jurisdictions of foreign national courts. Still, functional immunity provides protection for acts attributable to the state, but not for private acts. As has been established, international crimes are not to be seen as private acts. Removal of the functional immunity of a former head of state in the case of a serious international crime is only possible with an exception to the customary rule providing immunity. This thesis argues that removal is only possible in case a convention establishes jurisdiction and removes the immunity. Such a convention is the *1984 Torture convention*, as illustrated by the case *Pinochet No. 3*. Other conventions might also remove functional immunity, provided that it contains a provision of irrelevance of official capacity and provides for the exercise of jurisdiction. As a comparison, the *1948 Genocide Convention* contains a clause that removes functional immunity but recognises explicitly only territorial jurisdiction (or the jurisdiction of an international criminal tribunal). The conclusion is that foreign domestic courts provide some but still limited possibilities to fight impunity for heads of state responsible for international crimes.

Ad hoc tribunals and international hybrid courts have proven to be more effective for prosecution of heads of state for serious international crimes, as shown in the cases *Prosecutor v. Kambanda case* and *Prosecutor v. Milosevic*. If the court or tribunal is established by a Security Council Resolution acting under Chapter VII of the *UN Charter*, both the personal

immunity of serving heads of state and the functional immunity of former heads of state are removed. Also, functional immunity does not apply before hybrid criminal courts. Personal immunity probably does still provide protection for serving heads of state before a hybrid criminal court. This is because the sufficient mandate to remove the customary rule of personal immunity of serving heads of state is lacking since they are not established under a Chapter VII provision, although the case *Prosecutor v. Taylor* suggest otherwise. That particular case has though been heavily criticised by many leading legal scholars. Even if the *ad hoc* tribunals and international hybrid courts can provide effective means of ending impunity, their jurisdiction is often limited to specific regions and to specific periods of time. Therefore, they are not available as a universal solution to ending impunity.

In order to end impunity, the world is in need of a permanent international court, and by the establishment of the ICC in 2002, it got one. However, since the ICC is based on a treaty, the *Rome Statute*, it is also the result of compromises between the contracting states. Although it has the power to remove both functional immunity of former heads of state through Art 27(1) and personal immunity of serving heads of state through Art 27(2), its' reach is still somewhat limited. States, by becoming parties to the *Rome Statute*, accept the jurisdiction of the ICC and the removal of any possibility to invoke immunity. But the jurisdiction of the ICC is from the starting point limited to the principles of territoriality and active personality of the state parties. The back-up is the possibility of the Security Council to refer situations to the ICC. Under such referrals, since the Security Council is acting under Chapter VII of the *UN Charter*, the ICC has universal jurisdiction. Despite the fact that the Court is based on the *Rome Statute*, such a referral authorizes the ICC to put serving heads of state of non-party states on trial and also to remove their personal immunity. This power to remove the personal immunity of heads of state of non-parties is illustrated by the cases *Prosecutor v. Al Bashir* and *Prosecutor v. Gaddafi*. However, there are still some limitations to the ICC. The principle of complementarity

establishes that a case is only admissible to the ICC if the state is unwilling or unable to genuinely investigate or prosecute. The principle applies even after a Security Council referral. Although a case becomes admissible to the ICC in the case of improper investigations and sham trials, it still limits the power and effectiveness of the ICC in the fight against impunity. Furthermore, it should be noted that the ICC is facing some other challenges.

As an example, even though the numbers of parties to the *Rome Statute* at this writing has increased to 123 states, the universal jurisdiction of the Court, which is a prerequisite for the end to impunity, still requires the cooperation of the Security Council. In this context, it is problematic that the U.S., China and Russia, i.e. three of the five permanent members of the Security Council, have chosen not to become parties to the *Rome Statute*. In fact, they have taken quite offensive attitudes towards the ICC, especially the U.S. An example is the well-known bilateral "*non-surrender agreements*" that the U.S. has concluded with many state parties to the *Rome Statute* in order to shield U.S. nationals from being surrendered to the ICC. The U.S. has taken the view that such agreements are compatible with Art. 98(2) of the *Rome Statute* and would prevent the contracting states from cooperating with the ICC. It should however be noted that such agreements do not affect the jurisdiction of the ICC if a U.S. national in fact was prosecuted. Still, it might be considered problematic that the competence of the ICC depends on a large number of signatories or on a Security Council Referral, which can only be achieved in certain situations where the permanent members of the Security Council agree, but will be impossible in others because of their veto power. In this perspective, one has to conclude that a Chapter VII referral most likely never will take place for any of the five permanent members or their "allies".

Instead, all the ongoing situations under investigations at the ICC are of African origin; The Democratic Republic of Congo, Uganda, the Central African Republic, Sudan (Darfur), Kenya, Libya, Côte d'Ivoire and Mali. The African Union has delivered sharp criticism against this and raised

allegations that the ICC is only a court for Africa. In fact, the African Union has expressed that its members should refuse cooperation with the ICC in accordance with Art. 98 of the *Rome Statute*, even if they are parties to the Statute. Several of them, such as Malawi in the *Al Bashir case*, have disregarded requests of cooperation from the Court, even if they are parties to the *Rome Statute*.

Furthermore, in what can be interpreted as a response to the ICC's focus on African situations, the member states of the African Union on 1 July 2008 decided to create the *African Court of Justice and Human Rights* (ACJHR), through a merger of the *African Court on Human and Peoples' Rights* (AfCHPR) and the *African Court of Justice* (ACJ).[338] Although not yet functional, the main purpose of the court will be to serve as the principal judicial organ of the African Union. It will be authorized to try individuals accused of crimes against humanity and other serious international crimes. It is clear that at least serving heads of state will be able to invoke personal immunity when the Court becomes operational, which is a blow to the fight against impunity. During a summit in July 2014 the African Union adopted an amendment to the Statute of the ACJHR, which declares:

"No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[339]

This is of course unfortunate in the fight against impunity, and the immunity provision is in fact in conflict with the African Unions Constitutive Act, which rejects impunity under Article 4.[340] By adopting the provision, the leaders of the states of the African Union have declared that personal

[338] Information available at: http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/36559c2273ebfa0e852577ab00734690?OpenDocument (2015-05-25).
[339] Art. 46A in *Protocol on Amendments to the Protocol on The Statute of The African Court of Justice and Human Rights*. Available at: http://au.int/en/content/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (2015-05-25).
[340] Art. 4 states: *"The Union shall function in accordance with the following principles […] respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."*. However, Art. 4 also recognize the principles of sovereign equality and non-interference.

inviolability is of greater importance than personal accountability. It should however be noted that the ACJHR will not affect the ICC's ability to try heads of state. The ICC will still be able to exercise its jurisdiction and the Security Council will still be able to refer situations to the ICC. The criticism of the African Union does however entail a risk that African states might wish to withdraw from the *Rome Statute*. As an example, Kenya threatened to do so in 2013 when their president Uhuru Kenyatta was charged by the ICC, as described in the *Kenyatta* case. Kenya is still a party to the *Rome Statute*, but that might be on account of the fact that the charges against Kenyatta were eventually dropped.

In summary, it is clear that the ICC is probably not the end to impunity that the world hoped for when it was first established, and it is apparent that there are challenges ahead. It should however be noted that the ICC is now conducting preliminary examinations in several states outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, Iraq, Ukraine and Palestine. The future will tell whether any investigations will be initiated, but if they do it will hopefully mitigate the criticism from the African Union and ensure that the ICC is an international criminal court for the whole international society.

To answer the question raised in the introduction of this thesis, it is clear that heads of state in 2015 still can commit serious crimes against international law and be granted impunity. However, since the end of the last millennium important steps against impunity have still been taken. As this thesis has shown, several heads of state have actually been held responsible for their actions during this time period. Also, change does not happen overnight, and the development in humanitarian law is progressing. It was stated in the *Arrest Warrant* case that the law "*is in constant evolution, with a discernible trend to limiting immunity and strengthening*

accountability".[341] This indicates that there might be a definitive end to impunity in the future. But we are not there yet.

[341] *Arrest Warrant Case*, para. 75 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal).

Bibliography

Akande, D.	*ICC Issues Detailed Decision on Bashir's Immunity (…At long Last…) But Gets the Law Wrong*, EJIL: Talk, 15 December 2011. Available at: http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-longlast-but-gets-the-law-wrong/
Akande, D.	*International Law Immunities and the International Criminal Court*, (2004), AJIL Vol. 98 no. 3
Akande, D. & Shah, S.	*Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, EJIL Vol. 21 no. 4
Barker, J. C.	*International Law and International Relations* (2000)
Bassiouni, M. C.	*Introduction to International Criminal Law: Second Revised Edition* (2013)
Bassiouni, M. C.	*The Legislative History of the International Criminal Court* (2005)
Beigbeder, Y.	*International Criminal Tribunals: Justice and Politics* (2011)
Beigbeder, Y.	*International Justice against Impunity: Progress and New Challenges* (2005)
Bianchi, A.	*Immunity versus Human Rights: The Pinochet Case*, EJIL (1999), Vol. 10 No. 2
Brownlie, I.	*Principles of Public International Law*, Sixth edition (2003)
Bröhmer, J.	*State Immunity and the Violation of Human Rights* (1997)
Bullock, S.	*Prosecuting President Al Bashir, and the short arm of justice*, (2013) DLJ, Vol 25
Cassese, A.	*When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, EJIL* (2002), Vol. 13 No. 4,
Cassese, A.	*International Criminal Law* (2008)
Cassese, A., Acquaviva, G., Fan, M. and Whiting, A.	*International Criminal Law: Cases & Commentary* (2011)
Cassese, A., Gaeta, P., Jones, J. R. W. D.	*The Rome Statute of the International Criminal Court: A Commentary*, (2002), Vol 2.
Cryer, R., Friman, H., Robinson, D., Wilmshurst, E.	*An Introduction to International Criminal Law and Procedure, Third Edition* (2014)

Fox, H.	*The Law of State Immunity* (2002),
Fox, H.	*The Law of State Immunity, Second edition* (2008)
Gaeta, P.	*Does President Al Bashir enjoy immunity from arrest?* (2009), JICJ
Nieto-Navia, R.	*International Peremptory Norms (Jus Cogens) and International Humanitarian Law (2001).* Available at: http://www.iccnow.org/documents/WritingColombiaEng.pdf (2015-05-25)
Nwosu, U. N.	*Head of State Immunity in International Law* (2011), PhD thesis, Department of Law of the London School of Economics and Political Science. Available at: http://etheses.lse.ac.uk/599/ (2015-05-25)
Politi, M.	*The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead*, JICJ, 10 (2012)
Schabas, W. A.	*The International Criminal Court: A Commentary on the Rome Statute* (2010)
Shaw, M. N.	*International Law, Fourth edition* (2002)
Swaak-Goldman, O.	*Kambanda v. Prosecutor. NO. ICTR 97-23-A*, AJIL, vol. 95, No. 3 (Jul., 2001)
Triffterer, O.	*Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article -, Second Edition* (2008)
Van Alebeek, R.	*The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008)
Wardle, P.	*The Survival of Head of State Immunity at the International Criminal Court* (2011), AILJ
Watts, A.	*The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, Recueil des Cours, vol. 247 (1994)

Table of Cases

NATIONAL COURTS

Austria

Dralle v. Republic of Czechoslovakia, 17 ILR 155 (Supreme Court, 1950)

Belgium

Re Sharon and Yaron, 127 ILR 110 (Court of Cassation (Second Chamber), 2003); 42 ILM 2003 596 (*Sharon* case)

France

Gaddafi 125 ILR 490 (Court of Appeal & Court of Cassation, 2000, 2002) (*Gaddafi* case)

Israel

Attorney General of Israel v. Eichmann, 36 ILR 5 (District Court of Jerusalem, 1961) (*Eichmann* case)

Italy

General Wagener case, Rivista Penale II, 753 (Supreme Military Tribunal, 1950)

Spain

Fidel Castro, no.1999/2723 (Audiencia Nacional, 1999) (*Castro* case)

United Kingdom

Jones v. Saudi Arabia, UKHL 26 (House of Lords, 2006)

Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte, 2 All ER 97 (House of Lords, 1999) (*Pinochet No. 3*)

United States

Tachiona v. Mugabe, 169 F Supp 2d 259 (District Court for the Southern District of New York, 2001) (*Mugabe* case)

The Schooner Exchange v. McFaddon, 11 US (7Cranch) 116 (Supreme Court, 1812) (*Schooner Exchange* case*)*

United States v. Noriega, 746 F Supp 1506 (District Court for the Southern District of Florida, 1990)

United States v. Noriega, 117 F 3d 1206 (Court of Appeals 11th Circuit, 1997)

INTERNATIONAL COURTS AND TRIBUNALS

European Court of Human Rights

Al-Adsani v. United Kingdom, 34 EHRR 273 (case no 11) (2001); 123 ILR 24

International Court of Justice

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgement, ICJ Reports 2002 3 (*Arrest Warrant* case)

International Criminal Court (ICC)

Prosecutor v Laurent Koudou Gbagbo, No. ICC-02/11-01/11-1

Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11

Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09

Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v. Dusko Tadic, IT-94-1-AR72

Prosecutor v. Radislav Krstic, IT-98-33-A

Prosecutor v. Radovan Karadzic, IT-95-5/18

Prosecutor v. Slobodan Milosevic, IT-02-54

International Criminal Tribunal of Rwanda (ICTR)

Prosecutor v. Jean Kambanda, ICTR-97-23-DP

Permanent Court of International Justice

Case of the SS Lotus (France v. Turkey), Series A. No. 10 (PCIJ, 1927)

Special Court for Sierra Leone

Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-I