

IMMUNITY OF THE HEADS OF STATE UNDER CUSTOMARY INTERNATIONAL LAW: A BRIEF NOTE

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Abstract

Heads of State represent not only their respective country whenever they are traveling abroad but they also reflect the sovereignty of their respective state. This is because Heads of State are said to be the 'shadow' of the state in the eyes of international law. Since the outbreak of World War I, a number of Heads of State have been investigated and prosecuted before national and international tribunals to end impunity of international crimes of genocide, crimes against humanity and the crime of aggression and to provide justice to the victims of the crimes. To do so, those who involved directly and indirectly to the commission of these crimes must be held responsible regardless of their positions. Based on doctrinal analysis, this paper analyses the position of the immunity of Heads of State under international law and concludes that immunity attached to Heads of State has to be set aside in order to end the impunity of the alleged crimes and to uphold justice to the victims of international crimes as a binding international law rule.

Keywords: Immunity, ICC, Rome statute, binding, international crimes

INTRODUCTION

Before the outbreak of World War I, the ruler and State were considered as one and treated alike while enjoying absolute immunity or sovereign immunity⁷⁵ under the principle of *par in parem imperium non habet imperium*.⁷⁶ It reflects the principle of

⁷⁵ Hallie Ludsin, 'Returning Sovereignty to the People' (2013) 46 Vand J Transnat'l L 97, 102; Hans Corell, 'Sovereignty and Humanity: Reality and Possibility' (2007) 36 Denv J Int'l L & Pol'y 1, 1-2; Jerrold L Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings' (1986) 86 Colum L Rev 169, 170; Robert Lansing, 'Notes on Sovereignty in a State' (1907) 1 AJIL 105 124.

⁷⁶ This Latin maxim means 'an equal has no power over an equal'. See Anthony J Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013) 14 Chinese JIL 53, 59-60; Beth Van Schaack, 'Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression' (2012) 10 JICJ 133; Yoram Dinstein, 'Par in Parem Non Habet Imperium' (1966) 1 Isr L Rev 407.

sovereignty of States and subjecting States to a foreign court's jurisdiction amounting to a violation of the principle of State sovereignty or equality.⁷⁷

However, this sovereign immunity was no longer applied after the outbreak of World War where many rulers or the Head of State have been using their immunity for the impunity in committing crimes. Still, customary international law provides the Head of State with immunity *ratione personae* (personal or private immunity) and immunity *ratione materiae* (official immunity).⁷⁸

This customary rule was crystallised and codified into the Vienna Convention on Diplomatic Relations 1961 (VCDR)⁷⁹ and ratified by almost all UN Member States.⁸⁰ Thus, this paper briefly discusses the position of immunity of Heads of State under customary international law which is binding on states, regardless.

CUSTOMARY INTERNATIONAL LAW RULE ON IMMUNITY

Articles 29 and 31 of the VCDR provides that the diplomats shall be inviolable, not subject to arrest and enjoy an absolute immunity from criminal prosecution. Even though immunity under the VCDR only covers diplomats, their staffs and family, the International Court of Justice (ICJ) in both the *Arrest Warrant Case*⁸¹ and *Mutual Assistance in Criminal Matters Case*⁸² extended its application.

The ICJ in the above cases ruled that immunity under the VCDR should also be extended to State high-ranking officials. These high-ranking officials are the Head of State, Head of Government and Minister of Foreign Affairs, also known as the troika.⁸³

⁷⁷ Charter of the United Nations (24 October 1945) 1 UNTS XVI, art 2(1).

⁷⁸ Mark A Summers, 'Diplomatic Immunity *Ratione Personae*: Did the International Court of Justice Create a New Customary Law Rule in *Congo v. Belgium*' (2007) 16 Mich St J Int'l L 459, 467-68.

⁷⁹ Vienna Convention on Diplomatic Relations 1961 (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95. Hereafter, VCDR.

⁸⁰ Almost all UN Member States are Parties to the VCDR where there are currently 192 States are Parties to the VCDR. See United Nations Treaty Collection, 'Vienna Convention on Diplomatic Relations' <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en> accessed 9 October 2020.

⁸¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [51].

⁸² *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [170].

⁸³ See ILC, *Report of the ILC on the Work of its 63rd Session: Draft Resolution by the Sixth Committee* (8 November 2011) (UN GAOR, 66th Session) UN Doc A/C.6/66/L.26, [8]. Special Rapporteur Roman Kolodkin submitted three reports on the topic. See Special Rapporteur Roman Kolodkin, *Third Report* (24 May 2011) UN Doc A/CN.4/646; Special Rapporteur Roman Kolodkin, *Second Report* (10 June 2010) UN Doc A/CN.4/631 and Special Rapporteur Roman Kolodkin, *Preliminary Report* (29 May 2008) UN Doc A/CN.4/601. See also Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 132.

However, their immunities are temporal, belong to the State and can be waived by the State at any time pursuant to Article 32 of the VCDR.

Immunity *ratione personae* is applied to the sitting Head of State, whether he is travelling abroad or not and also covers both his official and private acts as long as he is in the office⁸⁴ even he has committed international crimes.⁸⁵ Once the reasonable period of time comes to an end, either when he leaves the receiving State or at the expiry of his tenure or appointment as the diplomatic agent, the Head of State is no longer protected under immunity *ratione personae*. Still, immunity *ratione materiae*, takes over but only limited to all official acts or conducts performed while he or she being the sitting Head of State.⁸⁶

CASES ON IMMUNITY OF HEADS OF STATES

I. Domestic Court and *ad hoc* Tribunals' Cases

The UK House of Lords in the *Pinochet Case*⁸⁷ held that the Head of State will not be protected under immunity *ratione materiae* if he has performed certain acts, in this case the act of torture which is outside his official duty while being the Head of State. In other words, States are bound to protect the inviolability and immunity of the Head of State as long as he has acted or performed official acts while being in the office as upheld by the ICJ in *Diplomatic and Consular Staff Case*.⁸⁸

Furthermore, in order to prevent impunity, the Head of State will not be protected under both *ratione personae* and *ratione materiae* if he is allegedly to have committed international crimes, such as genocide, war crimes and crimes against humanity as ruled by the ICJ in the *Arrest Warrant Case*.⁸⁹ This practice is not new and has been

⁸⁴ Eileen Denza, *Vienna Convention on Diplomatic Relations* (UN Audiovisual Library of International Law 2009) 1 and 4; Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 80; Michael A Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 Duke LJ 651, 655.

⁸⁵ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 EJIL 815, 818-19.

⁸⁶ VCDR, art 39(2).

⁸⁷ *Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others; Ex Parte Pinochet; R v Bartle and the Commissioner of Police for the Metropolis and Others* [1999] 2 All ER 97; Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237, 243.

⁸⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 [62]; Jonathan Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations' (1988) 37 ICLQ 53, 53-54.

⁸⁹ *Arrest Warrant Case* (n 7) [61]; David S Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgement as It Pertains to the Security Council and the International Criminal Court', (2004)

exercised by the *ad hoc* international tribunals after the outbreak of World War I and II,⁹⁰ such as before the International Military Tribunal (IMT) at Nuremberg, Germany.

The IMT was established through the London Agreement (LA)⁹¹ signed between the WWII Allied Powers in 1945 to prosecute German officials⁹² responsible for ordering and conspiring in the commission of aggressive wars,⁹³ war crimes⁹⁴ and crimes against humanity⁹⁵ as crimes prohibited under customary international law.⁹⁶

After Hitler committed suicide, Admiral Donitz, commander-in-chief of the German Navy, became the German Head of State.⁹⁷ By virtue of his position, Donitz was indicted before the IMT along with 23 other Nazi leaders for the alleged crimes.⁹⁸ Except for three who were acquitted,⁹⁹ all of the accused were found guilty by the IMT, including Donitz.¹⁰⁰ The judgments of the IMT, especially the principles from those judgments have been affirmed by the United Nations General Assembly (UNGA) in Resolution 95(1).¹⁰¹

20 Am U Int'l L Rev 7, 14, 17, 19; Dire Tladi, 'The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98', (2013) 11 JICJ 199, 220.

⁹⁰ John Dugard, 'Immunity, Human Rights and International Crimes' (2005) J S Afr L 482, 482-83.

⁹¹ Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, (signed at London on 8 August 1945, with Charter of the International Military Tribunal, entered into force 8 August 1945). Hereafter, LA. The Charter of the IMT (IMT Charter) will also be referred to or based on the LA.

⁹² Thomas U Berger, *War, Guilt, and World Politics After World War II* (CUP 2012) 38–41.

⁹³ IMT Charter, art 6(a).

⁹⁴ *ibid* art 6(b).

⁹⁵ *ibid* art 6(c).

⁹⁶ *See* Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention 1907); Treaty of Peace between the Allied and Associated Powers and Germany 1919 (signed at Palace of Versailles on 28 June 1919, entered into force 10 January 1920); George A Finch, 'The Nuremberg Trial and International Law' (1947) 41 AJIL 20, 26.

⁹⁷ Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945 -1 October 1946) vol I (Nuremberg 1947) 78, 310 and 311.

⁹⁸ *ibid* 27-79, for list of the accused persons and the detail of the indictments.

⁹⁹ *ibid* 310 and 367 (Schacht); 327 and 367 (Von Papen); 338 and 367 (Fritzsche).

¹⁰⁰ *ibid* 171-341; David M Crowe, *War Crimes, Genocide, and Justice: A Global History* (Palgrave MacMillan 2014) 165–66.

¹⁰¹ UNGA Res 95(I) (11 December 1946) UN Doc A/RES/95(I).

Furthermore, both President Slobodan Milosevic¹⁰² of Serbia and Federal Republic of Yugoslavia and President Charles Taylor¹⁰³ of Liberia were also been prosecuted before the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁰⁴ and the *ad hoc* Special Court for Sierra Leone (SCSL)¹⁰⁵ respectively for committing war crimes and crimes against humanity even though both of them were the sitting Head of State at the time of their indictment.¹⁰⁶

II. *The Permanent International Criminal Court (ICC)*

The practice of the investigation and the prosecution of Heads of State before domestic and international tribunal have been incorporated into the Rome Statute,¹⁰⁷ the founding treaty to the International Criminal Court (ICC). As the permanent international criminal court, the ICC has jurisdiction to investigate and prosecute international crimes¹⁰⁸ of genocide,¹⁰⁹ crimes against humanity,¹¹⁰ war crimes¹¹¹ and the crime of aggression or crimes against peace¹¹² pursuant to Article 27 where immunity of the Heads of State shall not bar the ICC from exercising its jurisdiction over the alleged perpetrators.

This can be seen, among others, when the crimes of genocide, war crimes and crimes against humanity have been allegedly committed in Sudan. The situation in Sudan has been referred to the ICC by the United Nations Security Council (UNSC) under

¹⁰² *Prosecutor v Slobodan Milosevic et al* (Second Amended Indictment) IT-02-54-T (28 July 2004).

¹⁰³ *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-A (26 September 2013); *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-T T, Ch II (18 May 2012); *Prosecutor v Charles Ghankay Taylor* (Indictment) SCSL-03-01-I (7 March 2003).

¹⁰⁴ The ICTY was established by the UNSC pursuant to UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

¹⁰⁵ The SCSL was established through an agreement between the Government of Sierra Leone and the UN pursuant to UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315.

¹⁰⁶ Sarah M H Nouwen, 'The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued' (2005) 18 LJIL 645, 667-68; Zsuzsanna Deen-Racsmany, 'Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity' (2005) 18 LJIL 299, 319.

¹⁰⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Preamble [10] and art 1.

¹⁰⁸ For more detail on the concept of international crimes, see William A Schabas, 'International Crimes' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 268-277.

¹⁰⁹ Rome Statute, art 6; William A Schabas, *Genocide in International Law: The Crimes of Crimes* (2nd edn, CUP 2009) 460.

¹¹⁰ *ibid* art 7; Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 AJIL 334, 352; Mohamed Elewa Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity' (2004) 5 San Diego Int'l LJ 73, 90-91.

¹¹¹ *ibid* art 8; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 247.

¹¹² *ibid* art 8bis; Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (TMC Asser Press 2014) 253.

Article 13(b) of the Rome Statute acting under Chapter VII of the UN Charter pursuant to Resolution 1593.¹¹³ As one of the alleged perpetrators of these crimes, the ICC has issued two arrest warrants against the Sudanese President, even though he is the sitting Head of State.

CONCLUSION

It has been established that there will be no immunity to both the sitting and former Head of State for allegedly committed the crimes of genocide, crimes against humanity, war crimes and the crime of aggression or crimes against peace since these crimes have been prohibited under international law. As a binding international law rule, his immunity has to be set aside by the ICC in order to end the impunity of the alleged crimes and to uphold justice to the victims of international crimes.

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¹¹³ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; Manisuli Ssenyonjo, 'II. The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 ICLQ 205, 208; Matthias Neuner, 'The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court' (2005) 8 YIHL 320, 321.

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