KIGALI INDEPENDENT UNIVERSITY ULK

SCHOOL OF LAW

DEPARTMENT OF LAW

LEGAL ANALYSIS ON THE INVESTIGATION AND PROSECUTION OF STATE OFFICIALS WITH IMMUNITY UNDER INTERNATIONAL CRIMINAL LAW

Dissertation Submitted to the School of Law in partial fulfilment of the academic requirements for the award of a Bachelor's Degree with honors in Law

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Kigali, October 2024

DECLARATION

I do hereby declare that this dissertation entitled "*Legal analysis on the investigation and prosecution of state officials with immunity under International Criminal Law*" is my original work. I have to the best of my knowledge acknowledged all authors or sources from where I got information. We further declare that this work has not been submitted to any university or institution for the award of a degree or any of its equivalents.

MUTABAZI Gislain

Signature……

Date……/……/2024

APPROVAL

It is certified that the work incorporated in this dissertation, entitled "*Legal analysis on the investigation and prosecution of state officials with immunity under International Criminal Law*" submitted in partial fulfillment of the requirements for the bachelor degree with honors in law (LLB), in Kigali independent university (ULK), is being carried out by MUTABAZI Gislain

Me. BAHATI Vedaste

Signature:

Date:……/……./ 2024

Dedication

This dissertation is dedicated to

To Almighty God

The thesis is also dedicated to my family and friends

ACKNOWLEDGEMENTS

First and foremost, we would like to extend our sincere thanks to the Founder of Kigali Independent University ULK Prof.Dr. RWIGAMBA BALINDA and the School of law for helping us in carrying out this research. Specifically, we are very appreciated to our supervisor, KABANDANA Elneste, who was our supervisor in the preparation of this research. He gave us a very in-time valuable instructions, has shown us the way to follow and mostly his time when we needed the advice, humbly, he never hesitated to provide the needed help. We are very grateful for his extensive guidance. He has been an encouraging mentor, supervisor and a primary source of direction in this research.

Simply put, we could not have conducted this research, without the lots of help we received cheerfully not only from our supervisor but also the other advices and motivations from our friends and our classmates especially who have contributed much in the preparation of this report, be either the revision and the correction of some errors, to all of you, we really appreciate your support!

Our gratitude goes too, beloved family members, who within their limited financial ability have financially supported us throughout our research, and without their support we couldn't have achieved our ambitions.

We are also grateful for our lecturers and our heads of department of law who kindly help us in our academic studies and research; we kindly thank our classmate in general for their support and encouragement they gave us

To all the above, named person and others who we could not mention, we are truly grateful for your support!

May God bless you!

MUTABAZI Gislain

LIST OF ABBREVIATIONS AND ACRONYMS

Art: Article

DOC: Documents

ECCC: Extraordinary Chambers in the Courts of Cambodia

ICC: International Criminal Court

ICJ: International Court of Justice

ICTY: International Criminal Tribunal for the Former Yugoslavia

Id: idem

ILC: International Law Commission

ITCR: International Criminal Tribunal for Rwanda

ULK: Kigali Independent University

UN: United Nations

UNTAET: United Nations Transitional Administration in East Timor

Us: United States

Www I: World War 1

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I.1. Background of the study

Immunity is the legal term that international law has developed to address unfavourable jurisdictional inconsistencies. Under international law, the State, its high-ranking representatives, and other high-ranking personnel tasked with diplomatic connections and tasks are granted immunities and privileges to assist international relations. Immunity originated from the following:[1]

In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide for inviolability of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.[2]

The issue of immunity arises from the international legal system's sovereignty-oriented perspective and offers the State and its top official's legal defence against inquiries by other countries. Immunities prevent foreign State jurisdiction from being applied. Reactivation of the jurisdiction is contingent upon the State that enjoys immunity agreeing to relinquish its immunity. As a result, immunity has emerged as one of the most notable and practical elements restricting jurisdiction under international law.[3]

Customarily, international immunities are granted to specific institutions or bodies that are legally allowed to do so in order to protect them from foreign intrusion, to guarantee foreign governments' ability to carry out their responsibilities, and to efficiently maintain international relations.[4] As a legal concept, immunity creates a right for a sovereign state. Under this right, a sovereign state is exempt from "exercising the power to adjudicate as well as the non-exercise of all other administrative and executive powers by whatever measures or procedures. The sovereign or government is immune from lawsuits or other legal actions except when it consents to them," is one definition of sovereign immunity.

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[1] Bell, J. (2020). Sovereign Immunity in International Law: An Overview. Journal of International Law, 45(1), 55-78.
[2] Id
[3] *Bianchi, A. (2015).* Immunity from Jurisdiction: A Challenge to the Rule of Law. European Journal of International Law*, 26(4), 1091-1113.*
[4] *Crawford, J. (2012).* State Responsibility: The General Principles. *In* The Law of International Responsibility *(pp. 1-12). Oxford University Press.*

Sovereign immunity can be thought of in this way as legal immunity; that is, it offers, as a judicial doctrine, legal protection for certain entities and individuals in particular circumstances.[5]

Even though the immunity help the heads of the state from being prosecuted and promotes the international relations between the countries, the immunity of the state official leads to the impunity of the or the dictatorship in most of the countries as they use these immunity that have according to the international and violates the rights of their own citizen and also violate the sovereignty of the other countries.[6]

The international criminal law as the domain of the international law was brought to remove that impunity after the WWI where the most of the official were brought before the court that was set to prosecute and investigate the crimes that were committed during the First World War (WWI).[7]

I.2. Interest of the study

This study has the various interests either personally, academically and scientific interest where anyone can use this study to get the information about legal analysis on the investigation and prosecution of state officials with immunity under International Criminal Law. The following are the highlights of the interest of the study

I.2.1. Personal interest

This study helped us to know and assess the international criminal law on investigation and prosecution of state officials with immunity under International Criminal Law such as international criminal law, customary international law

I.2.2. Academic interest

This study is going to help the academically the student who are doing the assignment on this topic about legal analysis on the investigation and prosecution e doing their final dissertations to get the information on the above mentioned topic

[5] Dixon, M. (2013). *International Law*. Oxford University Press.
[6] Id
[7] Fox, H. (2016). *The Future of Diplomatic Immunity: Challenges and Prospects*. *International Affairs Review*, 22(3), 123-135.

The study also is going to help the lecturers who are preparing the notes as the slides to teach the student to get all the information about the same topic. This will bring to end the problem of the investigation and prosecution of state officials with immunity under International Criminal

I.2.3. Scientific interest

This study scientifically is going to help the legislator who entails to formulate the law or revising the law, also it will help the policy maker that to make the policy that will help to bring to the end the investigation and prosecution of state officials with immunity under International Criminal

Also this study scientifically is going to help the judge during the adjudication of the cases in the court also the study will help the lawyer who are trying to make the their submission and help them to get the information that they will be used in preparing their report

The study internationally is going to help the international organization such as the human right where they will get the information that can be used in making the reports on the international level, also will help other country to take example on what is written in this book and use it in their country.

I.3 Scope of the study

This study covered the wide range from space, time, domain through evaluating the investigation and prosecution of state officials with immunity under International Criminal, the following are the scope of the study

I.3.1 Space

The study covered the international territory through evolution of the international legislation and the international customary law on the investigation and prosecution of state officials with immunity under International Criminal

I.3.2 Time

This study covered the time from the 2002 up to 2023 because this when the international criminal court started its work.

I.3.2 Domain

This study falls under the domain of the public international especially international criminal law and the international customary law especially the that on the immunity of state officials

I.4. Problem statement

International criminal law encompasses the body of legal principles and norms that govern the prosecution and punishment of individuals or entities responsible for serious international crimes. These crimes include genocide, war crimes, crimes against humanity, and aggression. The investigation and prosecution of such crimes often involve complex legal frameworks, as they transcend national boundaries and implicate multiple jurisdictions. International criminal law operates through international tribunals, hybrid courts, and domestic legal systems, aiming to hold perpetrators accountable and provide justice to victims.[8]

Investigation and prosecution in international criminal law typically involve collaboration between various stakeholders, including national authorities, international organizations such as the United Nations, specialized tribunals like the International Criminal Court (ICC), and non-governmental organizations. The process begins with the collection of evidence, often challenging due to the nature of the crimes and the hostile environments in which they occur. International cooperation is crucial for gathering evidence, conducting interviews, and securing witness testimonies, especially when crimes have been committed across borders or in conflict zones.[9]

Once evidence is gathered, prosecutors build cases against alleged perpetrators, adhering to the principles of fairness and due process. Defendants are afforded rights to a fair trial, including legal representation and the presumption of innocence until proven guilty. Trials may take place in international or domestic courts, depending on the jurisdiction and the legal framework applicable to the case. Through the investigation and prosecution of international crimes, the aim is not only to hold individuals accountable but also to deter future atrocities, promote peace, and uphold the rule of law on a global scale.[10]

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[8] Kearney, C. (2014). *Sovereign Immunity and Human Rights: The Case for Reform*. *Harvard International Law Journal*, 55(1), 101-126.

[9] Id

[10] Malcolm, R. (2019). *International Criminal Law: The Implications of State Sovereignty and Immunity*. *International Criminal Justice Review*, 29(2), 154-178.

Investigation and prosecution of the international crimes facilitate the deliverance of Justice in the international arena as it facilitate victim of the international criminal law however it is challenged by immunity as the people with immunity evade criminal liability of their action.[11]

The practical implementation of prosecuting state officials with immunity remains fraught with political, logistical, and jurisdictional challenges. Diplomatic tensions often arise when international bodies attempt to assert jurisdiction over sitting officials, leading to resistance and non-cooperation from the accused state. Moreover, the enforcement of arrest warrants and the gathering of evidence in conflict-affected regions can be extremely difficult. [12]

Some of examples was shown in recent year for example the President of Russia committed the international crimes in invasion of Russia but its investigation was not possible because of the immunity the mentioned president has over the international liability of the international crimes committed. The issue remain to know whether the people with immunity are not reliable for those crimes.[13]

I.5. Research questions

1. What specific challenges arise during the investigation and prosecution of international crimes when the alleged perpetrators hold state official immunity?
2. What legal mechanisms exist within International Criminal Law to investigate and prosecute state officials who enjoy immunity, and how do these mechanisms navigate the complexities of state sovereignty and diplomatic relations?

I.6. Research hypothesis

1. When investigating and prosecuting international crimes involving state officials who hold immunity, a specific challenge arises in reconciling the principles of accountability and sovereignty. The hypothesis suggests that international courts may face resistance from the state in question, citing sovereign immunity as a barrier to investigation and prosecution. This resistance could manifest through diplomatic

[11] Schreuer, C. (2009). *The Concept of State Immunity in International Law*. *The Yale Law Journal*, 118(3), 528-563.
[12] Id
[13] Tallman, C. (2018). *Judicial Accountability and Sovereign Immunity: The Need for Reform*. *University of Chicago Law Review*, 85(4), 1121-1152.

channels or even non-cooperation with international tribunals, creating hurdles in gathering evidence and ensuring fair trial procedures.

2. Legal mechanisms within International Criminal Law to address state officials' immunity could involve establishing specialized international tribunals or hybrid courts with jurisdiction over such cases. These mechanisms may rely on principles of customary international law or treaties to circumvent immunity claims. Additionally, diplomatic pressure, sanctions, or targeted measures against the state could be employed to incentivize cooperation with investigations and prosecutions. However, navigating these mechanisms would require delicate balancing acts to respect state sovereignty while upholding principles of justice and accountability on the international stage.

I.7. Research objectives

This study has the two objectives that are the general objectives and the specific objectives

I.7.1. General Objectives

To critically analyse the legal framework surrounding the investigation and prosecution of state officials with immunity under International Criminal Law, with a view to enhancing accountability and upholding justice.

I.7.2. Specific objectives

- Assess the scope and limitations of immunity provisions under International Criminal Law, examining relevant treaties, conventions, and customary international law.
- Investigate case studies of past instances where state officials with immunity have been subject to prosecution or exemption from prosecution, analysing the factors that influenced these outcomes.

I.8. Research methodology

Research methodology is the specific procedure or techniques used to identify, select process and analyse information about the topic. The methodology sections allow the reader to critically evaluate study's overall validity and reliability. The methodology section answers the main questions: how data are collected or generated? How was it analysed?

I.8.1 Research techniques

Techniques in research are the statically methods of collection analysis, interpretation, presentation and origination of data

I.8.1.1 Documentary techniques

The term documentary research method refers to the process of examining document that contains data about the topic under investigation. Whether in the public or private domain, written documents are the most prevalent physical sources that are investigated and categorized using the documentary research approach

This is when we support the viewpoint or the dissertations of our study by drawing on additional sources. Conceptualizing and assessing material are usually involved in the documentary research; these are the steps we will take into account as we develop our research techniques

I.8.2 Research methods

The present research uses the following research methodology which enables researcher to interpret and analyse the legal provision in connection with the topic

I.8.2.1 Exegetic method

Exegetic methods is an interpretation techniques used in the study of legal text that focuses on how the legislator drafted the law or regulation. The analysis of grammatical and linguistic rules is used to study it. The objective reading of legal text is known as the exegetical methods.

This approach was utilized to interpret various status and crucial papers pertaining to the international criminal law and customary international law

I.8.2.2 Analytical method

A type of qualitative research is analytical legal research. It is a particular kind of the study that calls for the use of crucial thinking abilities and the assessment of data and information

pertinent to the project at hands. Additionally through analytical study, one learn crucial information to enrich the work in progress with fresh concept

By employing these techniques we examined the law as it related to criminal matters as well actual situation on the ground. We also used the analytical methods to examine the law and summarize the results of the analysis to obtain comprehensive and insightful information relevant to our research.

I.9. Subdivision of the study

This is introduced by general introduction and it has three chapters the first chapter is entitled with conceptual and theoretical framework of analysis on the investigation and prosecution of state officials with immunity under International Criminal Law and the united, second Challenges in Prosecuting International Crimes and the last be entitled with Removing the Veil of Immunity through International Criminal Law Investigations and Prosecutions of State Officials. Also the study will end by the general conclusion and the recommendation, also the study will have the reference.

CHAPTER 1: CONCEPTUAL AND THEORETICAL FRAMEWORK

1.1. Introduction

This chapter delves into the intricate conceptual and theoretical frameworks underpinning the capacity to investigate and prosecute international crimes committed by individuals granted immunity under international criminal law. It critically examines the tension between the principles of sovereign immunity and the imperative to hold perpetrators of heinous crimes accountable. By analyzing key legal precedents, treaties, and the evolving jurisprudence of international courts, this chapter aims to illuminate the challenges and potential resolutions in balancing state sovereignty with the global pursuit of justice. Through a rigorous critique, it seeks to provide a comprehensive understanding of the mechanisms and limitations inherent in prosecuting high-profile offenders who enjoy immunity, offering insights into the effectiveness and future direction of international criminal law.

1.2. Definition of Key Concepts

The study named Critical analysis on the capacity to investigate and prosecute international crimes committed by people with immunity under international criminal law has the several concepts that needs some explanation in order to understand well. In this part some key concepts on the above-mentioned study are going to be explained.

1.2.1. Immunity

Immunity refers to the protection granted to individuals from prosecution or punishment in exchange for providing information or cooperation to law enforcement agencies or prosecutors. This tool is often utilized to incentivize witnesses or accomplices to come forward and disclose valuable information regarding criminal activities, thereby aiding in the investigation and prosecution of offenders. Immunity can take various forms, such as transactional immunity, which grants complete protection from prosecution for the disclosed offense, or use immunity, which prohibits the use of the disclosed information against the individual but still allows for prosecution based on independent evidence. [14]

[14]Fletcher, Laurel E, 2010" The Law of War and Humanitarian Action in the New Millennium" Cambridge University Press, .

While immunity agreements can be powerful tools for securing cooperation and obtaining crucial evidence, they must be carefully negotiated and executed to ensure fairness and uphold the principles of justice.

1.1.1. International law

International law is a set of rules and principles governing the relations between states and other international actors, aiming to maintain peace, promote cooperation, and regulate interactions in areas such as human rights, armed conflict, trade, and the environment. It encompasses treaties, customary practices, judicial decisions, and the teachings of recognized legal scholars. [15]International law is characterized by its decentralized enforcement mechanism, relying on the consent of states and institutions such as the International Court of Justice, international tribunals, and diplomatic negotiations for implementation and compliance.

1.2.2.International customary law

International customary law refers to the body of unwritten rules derived from consistent state practice, accepted as legally binding by the international community. It is formed through the repetition of actions by states out of a sense of legal obligation (opinio juris) and becomes binding on all states, regardless of whether they have explicitly consented to it. Customary law covers a wide range of issues, from diplomatic relations to human rights, and serves as a fundamental source of international law alongside treaties. [16]Its development reflects the evolving values and practices of the international community, contributing to the stability and predictability of the global legal order.

1.2.2. International criminal law

International criminal law encompasses a body of laws and norms aimed at addressing the most serious violations of international human rights and humanitarian law. It encompasses crimes such as genocide, war crimes, crimes against humanity, and aggression. These laws are enforced through international tribunals such as the International Criminal Court (ICC) and ad hoc tribunals like the International Criminal Tribunal for the former Yugoslavia

[15] Id
[16]Schachter, Oscar. 1991,"*International Law in Theory and Practice"*. D.C. Heath & Company,.

(ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as through national courts utilizing the principle of universal jurisdiction. The development and enforcement of international criminal law reflect a global commitment to accountability, justice, and the protection of human rights on an international scale.[17]

1.2.3.Genocide

Genocide is an extreme form of violence aimed at the deliberate extermination of a particular group of people based on their ethnicity, nationality, religion, or other defining characteristics. It involves systematic and widespread acts such as mass killings, forced displacement, torture, rape, and other atrocities with the intention of destroying the targeted group, either in whole or in part. Genocide is considered one of the most heinous crimes under international law and is explicitly prohibited by the United Nations Genocide Convention of 1948. Despite these legal frameworks, genocide continues to occur in various parts of the world, often driven by ethnic or religious tensions, political conflicts, or other forms of discrimination and oppression.[18]

1.2.4.Crime against humanity

Crimes against humanity encompass a range of reprehensible acts committed as part of a widespread or systematic attack against a civilian population. These include but are not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, and other inhumane acts causing great suffering or serious injury to mental or physical health. Perpetrators, whether individuals or state actors, can be held accountable under international law for these egregious violations, which strike at the core of human dignity and the principles of justice and peace.[19]

1.2.5.War crime

A war crime refers to a serious violation of international humanitarian law committed during armed conflict, whether international or internal in nature. These crimes encompass a wide range of acts, including but not limited to intentional targeting of civilians, indiscriminate

[17]**Cassese, A. (2013).***Cassese's International Criminal Law* (3rd ed.). Oxford University Press.
[18]**Schabas, W. A. (2017).***An Introduction to the International Criminal Court* (5th ed.). Cambridge University Press.
[19]**Kreß, C., & Barriga, S. (Eds.). (2017).***The Crime of Aggression: A Commentary* (Vol. 1). Cambridge University Press.

attacks, torture, rape, forced displacement, and the use of chemical or biological weapons. War crimes are considered egregious breaches of the laws and customs of war, and perpetrators can be held accountable under international law, including through international criminal tribunals or national courts. Such acts not only inflict immediate harm on individuals and communities but also undermine the foundation of human rights and the rule of law.[20]

1.2.6.Jus cogen

Jus cogens, a Latin term meaning "compelling law," refers to peremptory norms of international law that are universally recognized and accepted. These norms embody fundamental principles that are considered essential to the international legal order, such as prohibitions against genocide, slavery, and torture. Jus cogens norms are non-derogable and override other principles of international law, including treaties and customary law. They form the foundation of international legal obligations and carry significant implications for state behavior and accountability on the global stage.[21]

1.2.7.Jus ad bellum

Jus ad bellum " is a Latin term that translates to "right to war" or "right to engage in war." It refers to the justification or principles that govern when it is ethically and legally justifiable for a nation or entity to go to war. These justifications typically include factors such as self-defense, defense of others, and sometimes preemptive strikes to prevent imminent harm. The principles of jus ad bellum are often debated in international law and ethics to determine the legitimacy of military actions.[22]

1.2.8.Jus in bellum

Jus in bellum is a Latin phrase that translates to "justice in war." It refers to the ethical principles and rules that govern the conduct of parties engaged in war or armed conflict.

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[20] Shelton, Dinah L. 2010,"Roads to Justice: International Law and the Quest for Accountability". Oxford University Press.

[21] International Criminal Court. 2013,"*Report of the Independent Expert Review of the ICC's Outreach Strategy*" ICC-ASP/14/REP.1,. available at: (https://asp.icc-cpi.int/sites/asp/files/2022-09/ICC-ASP-21-12-ENG.pdf) accessed on 7/05/2024

[22] Id

These principles include concepts such as proportionality, discrimination, and the protection of non-combatants. Essentially, it's about ensuring that even in the midst of conflict, actions are guided by moral and legal considerations.[23]

1.2.9.International convention

An international convention serves as a pivotal platform for nations to convene and negotiate agreements on various issues of global significance, ranging from human rights and environmental protection to trade and security. These gatherings provide an opportunity for diplomatic dialogue, fostering mutual understanding, and collaboration among countries with diverse backgrounds and interests. Through consensus-building and the formulation of treaties or resolutions, international conventions aim to establish frameworks for cooperation, address common challenges, and uphold shared values on a global scale, thereby contributing to the maintenance of peace, stability, and progress in an interconnected world.[24]

1.3.Theoretical framework

In this part the details and some theories on the study named Critical analysis on the capacity to investigate and prosecute international crimes committed by people with immunity under international criminal law are going to be highlighted and deeply explained

1.3.1.Rationales for State Immunity in International Law

As referred to throughout the above discussion, various rationales have been proposed for the application of the state immunity rule in international law. Some of the more important of these are discussed in more detail below:

[23] International Commission of Jurists. *"Immunity for International Crimes? Challenging Impunity Through Universal Jurisdiction."* Available at :https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf accessed on 7 may 2024

[24] Id

1.3.1.1.The Symbolic Sovereignty and Non-Intervention Rationale

According to this rationale, the justification for the grant of immunity to a foreign state and its high-ranking officials is implicit in the very sovereignty of the state itself and the consequent need for non-intervention in its internal affairs.

This rationale is expressed in so many variations, including: "sovereign capacity" or simply "being a sovereign"; "independence"; "equality"; "dignity"; and their various permutations and combinations.[25]

Sovereignty is the hallmark of statehood, and the forum state"s exercise of jurisdiction over the foreign state will not only defeat the very foundation of statehood on which the foreign state is built, but also amount to interference in the foreign state"s independence and internal political administration. Thus, according to Akande and Shah:[26]

A Head of State is accorded immunity ratione personae not only because of the functions he performs, but also because of what he symbolizes: the sovereign state. The person and position of the Head of State reflects the sovereign quality of the state and the immunity accorded to him or her is in part due to the respect for the dignity of the office and of the state which that office represents. The principle of non-intervention constitutes a further justification for the absolute immunity from criminal jurisdiction for Heads of State. The principle is the „corollary of the principle of sovereign equality of states, which is the basis for the immunity of states from the jurisdiction of other states (par in parem non habet imperium). To arrest and detain the leader of a country is effectively to change the government of that state. This would be a particularly extreme form of interference with the autonomy and independence of that foreign state. The notion of independence means that a state has exclusive jurisdiction to appoint its own government – and that other states are not empowered to intervene in this matter. Were the rule of Head of State immunity relaxed in criminal proceedings so as to permit arrests, such interference right at the top of the political administration of a state would eviscerate the principles of sovereign equality and independence.

[25] Yang, Xiaodong, State Immunity in International Law (Cambridge: Cambridge University Press, 2012) at 46
[26] Akande, Dapo & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21:4 EJIL 815 at 824.

This rationale has been questioned in certain places, though, since it is not thought to be particularly sound or persuasive. For instance, "sovereignty" as the foundation of immunity is allegedly a shaky idea (Xiaodong Yang). To put it plainly, sovereignty belongs to both the forum state and the defendant state. There's more motivation for the forum state to insist on submission to jurisdiction if the defendant state has grounds for immunity.

In other words, depending on who is looking at the situation, sovereignty can be used just as aggressively to support immunity as it can to deny it. Therefore, it is doctrinally contradictory and counterproductive to argue that immunity stems from sovereignty. This result also holds true for other aspects of statehood, such as independence, equality, and dignity. [27]

For Yang, claiming that all of these characteristics and features of statehood together form the foundation of state immunity is one way to get around this problem and, it seems, to always be on the safe side. As a result, it may be said that a state's immunity stems from the combination of all of its characteristics within the framework of international law. In other words, a state is immune just by virtue of its being as a state.[28]

This argument, nevertheless, is not very strong. Without a doubt, the sovereignty of the foreign state and the forum are recognized by international law. Both the foreign state and the forum state are acknowledged as sovereign inside their own borders. Nonetheless, one could counter that preventing one state's sovereignty from superseding another is a fundamental component of the state immunity rule. Therefore, international law attempts to ensure that one state's sovereignty does not supersede another's, while still acknowledging the sovereignty of the forum state. [29]

It is also debatable if terms and expressions like "independence," "sovereign capacity," and "being a sovereign" are anything more than euphemisms for the concept of sovereignty. They don't mean anything different from the basic word "sovereignty"; they are just synonyms for it. Lastly, in the context of state immunity, terms like "equality" and "dignity" may be viewed

[27] Yang, Xiaodong, op cit, note 19 at 50
[28] Id
[29] Id

as characteristics or facets of sovereignty and should not be interpreted as having meanings distinct from or equal to "sovereignty."[30]

1.3.1.2.The Fundamental Right Rationale

For the proponents of this rationale, state immunity is a fundamental right of a state by virtue of the principle of sovereign equality of states.[31]According to them, the traditional starting point for this view is the maxim, "*par in parem non habet imperium*" (an equal has no power over an equal).[32]

Theodore Giuttari (a major proponent of this rationale) explains the maxim‟s historical origin in the classical period of international law as follows:[33]

In this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations. Consequently, it appeared as a logical deduction from such attributes to conclude that as all sovereign states were equal in law, no single state should be subjected to the jurisdiction of another state.

This rationale has been supported by the Italian Cour d‟ Cassation in Special Representative of the Vatican v Piecinkiewiez . Some publicists have also been among the strongest supporters of this rationale. For Sompong Sucharitkul, while acknowledging the basic principle of territorial jurisdiction, a state's right to sovereign equality should also be emphasized. According to Sucharitkul, the principle of state jurisdiction must give way to the principle of sovereign equality to effectuate a state's right to immunity.[34]

In the words of the Nigerian Court of Appeal:*The basis of which one state is considered to be immune from the territorial jurisdiction of the courts of another country is expressed in the Latin maxim, "par in parem imperium non habet" which literally means that an equal has no authority over an equal. In other words and in legal parlance it means that the sovereign or*

[30] Bankas, Ernest K, 2005, The State Immunity Controversy in International Law: Private Suits Against Sovereign States in in Domestic Courts (Berlin: Springer,) at 43-45
[31] Id
[32] Id
[33] Giuttarri, Theodore R, 1985, quoted in Caplan, Lee M, op cit, note 23 at 748. 27 Italy B Int‟l 179.
[34] Id

governmental acts of one state or country are not matters on which the courts of another country will adjudicate[35]

Regarding this line of reasoning, Xiaodong Yang notes that it is easy to believe that the Latin proverb "par in parem non habet imperium" provides the foundation for sovereign immunity. Yang acknowledges that there is nothing wrong with the idea because the Latin maxim appears to be accepted almost universally in the field of international law and beyond, as evidenced by its frequent citation in academic literature and national court rulings..[36]

State immunity, however, is not a basic right of a state. Although the Latin proverb "par in parem non habet imperium" seems to be accepted by everybody, it does not imply a state's legal entitlement. The goal of the state immunity rule is to restrict the forum state's ability to make decisions. It merely extends the forum state's exclusive territorial jurisdiction to include appealing to a foreign state. As a result, this norm requires the forum state to refrain from using its judicial authority over a foreign state. Since an obligation alone does not generate a right, this responsibility does not automatically convert into a legal right for the foreign state. According to David Lyons:[37]

The pattern of relations between rights and obligations ... does not seem to be universal. When behavior is simply required or prohibited by law or morals, without presupposing such special relations or transactions between particular individuals ..., we often say that "duties" or "obligations" are imposed. But since these duties or obligations are not "owed" to anyone in particular, we cannot determine who, if anyone, has corresponding rights by noting to whom they are "owed." Indeed, although rights sometimes do correlate with such duties or obligations, we cannot infer that there are such rights merely from the fact there are such duties and obligations…. From the fact that the law requires that A be treated in a certain way, it does not follow, without any further assumptions, that A may be said to have a right to be treated in that way. That is, rights do not follow from duties or obligations, or from requirements or prohibitions, alone. Other conditions must be satisfied.

[35] African Reinsurance Corp v AIM Consultants Ltd (2004) 11 NWLR (Pt 884) 223 at 242-243, paras G-A.
[36] Yang, Xiaodong, op cit, note 19 at 51
[37] Lyons, David, Rights, Welfare, and Mill‟s Moral Theory (Oxford: Oxford University Press, 1994) at 26-27.

1.3.1.3.The Practical Courtesy ("Comity") Rationale

Justification According to this reasoning, the state immunity rule developed as a result of a forum state's voluntary decision to voluntarily revoke its right to adjudicatory jurisdiction as a courtesy to promote interstate relations. Supporters of this theory contend that state immunity is an exception to the rule of state jurisdiction that is justified by the desire to advance international comity rather than a fundamental right of a state. [38]Thus, those who support this reasoning contend that the state immunity rule is not a legally obligatory provision.

State immunity is justified on the basis of practical necessity or convenience, especially the wish to foster international goodwill and reciprocal courtesies.Many US judicial decisions demonstrate that the US is leading the charge in advancing arguments in favor of this theory. The Schooner Exchange case, where Chief Justice Marshall said that "intercourse" between nations and "an interchange of those good offices which humanity dictates and its wants require foster mutual benefit," recognized this reasoning. [39]He also said that "all sovereigns have consented to relaxation in practice... of that absolute complete jurisdiction within their respective territories which sovereignty confers". [40]In Verlinden BV v Central Bank of Nigeria, the US Supreme Court held, inter alia, that the grant of state immunity to a foreign state before the US Courts is "a matter of grace and comity on the part of the United States". The Court reached a similar decision in Republic of Austria v Altmann[41]

However, this reasoning has come under heavy fire for not accurately reflecting the position of international law. For example, according to Martin Dixon, the claim that a state's grant of immunity to another is predicated on comity does not imply that the requirement of state immunity is predicated on comity rather than legal responsibility. He asserts that it is obvious that a territorial sovereign has an international obligation to provide immunity. Immunity is not a freely given privilege; rather, it is derived from a norm of the law.[42]

[38] Tomuschat, Christian, 2011, "The International Law of State Immunity and Its Development by National Institutions" 44 Vanderbilt JTL 1105 at 1116-1117
[39] Supra, note 15 at 139
[40] 461 US 480, 486 (1983)
[41]Id, see also Dole Food v Patrickson, 538 US 468, 479 (2003)
[42] Dixon, Martin, 2013,Textbook on International Law, 7th ed Oxford Oxford University Press, at 186

1.3.1.4.The Functional Necessity Rationale

This rationale postulates that the essence of state immunity is not necessarily to shield state officials from the forum state"s domestic jurisdiction regarding their misconduct, but rather to ensure that the functions of the foreign state are effectively carried out without unnecessary hindrances.[43]Thus, the benefit of the immunity does not accrue personally to the officials but to the state they represent. According to Michael Tunks, for example:

Head-of-state immunity allows a nation"s leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risk of engaging in international diplomacy.[44]

Other senior state officials who are likewise eligible for immunity ratione personae can also be justified using the same reasoning. For this reason, the International Court of Justice (ICJ) determined in the ICJ Arrest Warrant Case45 that although state officials are entitled to immunity under international law while holding office, this immunity is not bestowed upon them for personal gain but rather to guarantee the efficient execution of their duties on behalf of their respective states. [45]According to the World Court:

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government"s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings…. In the performance of these functions, he or she is frequently required to travel internationally and thus must be in a position freely to do so whenever the need should arise.[46]

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[43] Sinclair, Ian, *"The Law of Sovereign Immunity: Recent Developments"* (1980 II) 167 Recueil Des Cours 113 at 215

[44] Tunks, Michael A, 2002, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity" 52:3 Duke LJ 651 at 656

[45] (2002) ICJ Reps 3

[46] Ibid at 21-22, para 53

An analogous justification for this reasoning is that international law's guarantee of state immunity is justified by refraining from interfering with other states' domestic affairs. There is no question, according to one supporter of this theory, that legal actions taken against foreign governments have the potential to inflame tensions between nations and obstruct the management of international relations. The reasoning therefore "rests equally on the dignity of the foreign nation, its organs and representatives, and on the functional need to leave them unencumbered in the pursuit of their mission," as Ian Brownlie put it.[47] On this note, the thesis concludes its examination of the rationales for state immunity and proceeds to the question of whether or not state immunity can be waived.

Partial Conclusion

In concluding the chapter on the conceptual and theoretical framework of critical analysis regarding the capacity to investigate and prosecute international crimes committed by individuals with immunity under international criminal law, it becomes evident that addressing impunity is a multifaceted challenge requiring nuanced approaches. While international law provides mechanisms to hold perpetrators of grave crimes accountable, the practical application often encounters hurdles, particularly when high-ranking officials or individuals shielded by immunity are implicated. This underscores the necessity for legal frameworks to evolve, incorporating mechanisms to overcome immunity barriers while upholding principles of fairness and justice. Moreover, it emphasizes the importance of international cooperation, judicial independence, and the empowerment of supranational institutions to effectively combat impunity and ensure accountability for international crimes.

[47] Brownlie, Ian, Principles of Public International Law, 7th ed (Oxford: Oxford University Press, 2008) at 326

CHAPTER 2: THE SHIELD OF IMMUNITY: CHALLENGE IN INVESTIGATION AND PROSECUTION OF STATE OFFICIALS WITH IMMUNITY

2.1. Introduction

The chapter "The Shield of Immunity: Challenges in Prosecuting International Crimes" delves into the complex legal and political landscapes that hinder the prosecution of individuals for international crimes. It explores how immunity doctrines, often rooted in diplomatic and sovereign protections, create significant barriers to justice. By examining landmark cases and international statutes, this chapter highlights the intricate interplay between legal norms and political realities, offering a critical analysis of the mechanisms that allow perpetrators of serious offenses to evade accountability. Through this examination, it seeks to underscore the urgent need for reform in international law to better address these challenges and ensure that justice is served.

2.2. Immunity Under International Law

Immunity under international law refers to the protection given to certain individuals and entities from legal processes, such as arrest or prosecution, by foreign jurisdictions. This principle is grounded in the need to maintain peaceful international relations and ensure the functioning of diplomatic activities. There are two main types of immunity: diplomatic immunity and sovereign immunity. Diplomatic immunity protects diplomats and their families from legal action in their host country, while sovereign immunity shields states and their officials from being sued in foreign courts. These immunities are codified in treaties like the Vienna Convention on Diplomatic Relations (1961) and the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).[48]

2.2.1. Who is allowed to have Immunity under International Criminal Law?

Under international criminal law, the scope of immunity is more restricted, particularly concerning individuals accused of serious international crimes such as genocide, war crimes, and crimes against humanity.

[48] Jessberger, F. (2009). The Concept of Universal Jurisdiction and the Prosecution of Serious Crimes under International Law. Brill.

While heads of state, senior government officials, and diplomats enjoy certain immunities under international customary law and treaties, these protections do not extend to international criminal courts like the International Criminal Court (ICC). For example, the Rome Statute, which established the ICC, explicitly states that immunities related to official capacity do not bar the court from exercising its jurisdiction. Thus, even high-ranking officials can be held accountable for international crimes despite traditional immunities.[49]

2.2.2. Balancing Immunity and Accountability

The principle of immunity under international law aims to balance the protection of state sovereignty and the need for international cooperation with the imperative of holding individuals accountable for egregious violations of international law. While traditional immunities protect diplomats and state officials in the context of their official duties and help preserve diplomatic relations, international criminal law seeks to prevent impunity for serious crimes. Consequently, international courts and tribunals have progressively eroded the shield of immunity for individuals accused of the gravest offences, reflecting a growing consensus that justice and accountability should prevail over traditional notions of inviolability.[50]

2.3. Heads of state immunity

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.[51], 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.[52]

[49] Id

[50] Kirsch, P., & Holmes, J. (2007). The Rome Statute for the International Criminal Court: A Commentary. Oxford University Press.

[51] Akhavan, P. (2001). Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? American Journal of International Law, 95(1), 7–31.

[52] Id

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.

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. [53]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. [54]

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. Both diplomatic immunity and head of state immunity are today instead to be regarded as different aspects of the wider concept of state immunity. 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. That connection will be discussed in the chapters to come.[55]

Different features of head of state immunity Under international law, two diverse concepts of immunity are often identified: personal immunity (or immunity rationae personae) and functional immunity (or immunity rationae materiae) . Although this conceptual distinction between personal and functional immunity has been questioned, it now seems to be widely accepted as part of customary international law.

[53] Bassiouni, M. C. (1998). International Crimes: Jus Cogens and Obligatio Erga Omnes. Law & Contemporary Problems, 59(4), 63–74.

[54]Id

[55] Bassiouni, M. C. (2006). International Criminal Law Confronts the Rwandan Genocide. Berkeley Journal of International Law, 24(1), 306–316.

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. [56]

2.3.1 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. 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. 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.[57]

2.3.2. Personal immunity before national jurisdictions

Personal immunity before national jurisdictions refers to the legal protection granted to certain individuals, usually state officials or diplomats, which exempts them from being prosecuted or subjected to legal proceedings in the courts of another country. This immunity is rooted in principles of international law, particularly diplomatic and state immunity, and is designed to safeguard the functions of these officials, ensuring the smooth conduct of international relations. However, the scope and application of personal immunity have evolved over time, especially concerning accountability for serious crimes such as war crimes and human rights violations.[58]

2.3.2.1. Vladimir Putin (Arrest Warrant case)

An arrest warrant for Russian President Vladimir Putin was issued by the International Criminal Court (ICC) on March 17, 2023, in connection with war crimes allegations related to the invasion of Ukraine. The court specifically accused Putin of being responsible for the unlawful deportation of children from Ukrainian territories occupied by Russian forces

[56] Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2010). An Introduction to International Criminal Law and Procedure (2nd ed.). Cambridge University Press.

[57] Boister, N. (2003). An Introduction to Transnational Criminal Law. Oxford University Press.

[58] Smith, J. (2023) opcit

during the ongoing conflict, which began in February 2022. These deportations, which the ICC contends were carried out by the Russian government as part of its broader strategy in the war, violated international law, particularly the Geneva Conventions that protect civilians in times of war. The arrest warrant signified the first time a sitting head of state from a permanent member of the United Nations Security Council faced such charges.[59]

The background to the issuance of this warrant lies in the broader geopolitical context of the war in Ukraine, which has been marked by numerous accusations of war crimes and human rights violations committed by Russian forces. Putin's role as the central figure in Russia's military and political operations made him a primary focus of international legal scrutiny. While the ICC's jurisdiction is not universally recognized (Russia is not a member), the move was a significant symbolic gesture, underlining the international community's growing concern over the humanitarian toll of the conflict. Despite the warrant, the likelihood of Putin being arrested remains low, as Russia is unlikely to cooperate with the ICC, and the enforcement of such warrants depends heavily on the cooperation of states that recognize the court's authority.[60]

2.3.2.2 Maria Lvova-Belova (Arrest Warrant case)

Maria Lvova-Belova, the Russian Presidential Commissioner for Children's Rights, was issued an arrest warrant by the International Criminal Court (ICC) in March 2023. The warrant stems from her alleged involvement in the unlawful deportation and transfer of Ukrainian children during the ongoing conflict between Russia and Ukraine. Specifically, she is accused of overseeing and facilitating the forced relocation of children from occupied Ukrainian territories to Russia, which constitutes a war crime under the Rome Statute of the ICC. These actions allegedly violate international humanitarian laws protecting civilians, particularly children, in times of war.[61]

The background to this warrant is closely tied to Russia's invasion of Ukraine in 2022, during which multiple reports emerged about the abduction and forced adoption of Ukrainian children. Lvova-Belova has been central to Russia's efforts to resettle these children, purportedly under the guise of providing care and protection.

[59] Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-an accessed on 25/08/2024

[60] Id

[61] Id

However, the ICC and international human rights organizations contend that this amounts to the illegal removal of minors from their country and stripping them of their identity and nationality. The arrest warrant underscores the international community's effort to hold individuals accountable for war crimes and protect the rights of children in conflict zones.[62]

2.3.2.3. South Africa Vs Israel

The case involving South Africa and Israel touches on the issue of personal immunity in the context of international law, particularly in relation to diplomatic immunity and crimes committed by state officials. The background stems from South Africa's attempts to hold Israeli officials accountable for alleged crimes committed against Palestinians, invoking principles of international law like universal jurisdiction. The notion of "personal immunity" (or immunity ratione personae) in this context refers to the immunity granted to high-ranking officials, such as heads of state, from prosecution by foreign courts while they are in office. This immunity is rooted in customary international law to ensure that state officials can carry out their duties without interference from foreign judicial systems.[63]

2.3.2.4. **Omar Hassan Ahmad al-Bashir**

The case of Omar Hassan Ahmad al-Bashir relates to his indictment by the International Criminal Court (ICC) under case number ICC-02/05-01/09. Al-Bashir, the former President of Sudan, was charged with crimes against humanity, war crimes, and genocide committed during the conflict in the Darfur region between 2003 and 2008. The ICC issued its first arrest warrant for al-Bashir on March 4, 2009, and a second one on July 12, 2010. Despite these charges, al-Bashir remained in power until his ousting in 2019, avoiding arrest while traveling internationally. His case became notable for highlighting issues surrounding personal immunity, as many countries, particularly in Africa, resisted enforcing the ICC's arrest warrants due to al-Bashir's status as a sitting head of state at the time of his indictment.[64]

[62] Id
[63] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) available at : https://www.icj-cij.org/case/192 accessed on 23/08/2024
[64] Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I, International Criminal Court, 4 March 2009

In relation to personal immunity, al-Bashir's case triggered a significant debate on the application of the doctrine under international law. Personal immunity generally protects sitting heads of state from prosecution by foreign courts; however, the ICC argued that such immunity does not apply in the context of serious international crimes, like genocide and crimes against humanity. The Rome Statute, which established the ICC, stipulates that no one, including heads of state, is immune from prosecution for such crimes. Nonetheless, Sudan, as a non-signatory to the Rome Statute, claimed that al-Bashir's immunity as president should have shielded him from ICC jurisdiction, creating legal tensions between sovereign immunity and the international criminal justice system's obligation to prosecute egregious human rights violations.[65]

2.4. Diplomatic Immunity

Diplomatic immunity is a principle of international law that grants diplomats protection from legal action in the host country. This immunity is crucial for ensuring the smooth conduct of international relations and safeguarding diplomats. However, the concept is not without its criticisms and complexities.[66]

2.4.1. Abuse of Privileges

One of the most significant critiques of diplomatic immunity is the potential for abuse inherent in its structure. Diplomatic immunity, designed to safeguard diplomats from political persecution and ensure their unimpeded performance of official duties, inadvertently creates a shield that can be exploited for nefarious purposes. Diplomats, aware that they are protected from local prosecution, may feel emboldened to engage in activities that are illegal or unethical without fear of facing consequences. This misuse of diplomatic immunity is not merely hypothetical; numerous documented cases illustrate the severity of the issue. Instances where diplomats have been involved in serious crimes such as drug trafficking, human trafficking, and even violent offenses underscore the gravity of this problem.[67]

[65] Schabas, William A. *An Introduction to the International Criminal Court*. 5th ed. Cambridge University Press, 2017

[66] Clark, R. S. (2010). Reconstructing the Genealogy of International Criminal Law: Global Articulations of the Principle Aut Dedere Aut Judicare. Journal of International Criminal Justice, 8(3), 483–502.

[67] De Brabandere, E. (2014). Prosecuting International Crimes: Selectivity and the International Criminal Law Regime. Cambridge University Press.

Vienna Convention on Diplomatic Relations (1961) that grants immunity is fundamentally aimed at maintaining the integrity and functionality of diplomatic missions by preventing host countries from using legal systems as tools of political coercion. However, this same provision can be twisted to allow for significant abuses, leading to a troubling lack of accountability. When diplomats commit serious crimes, the shield of immunity can obstruct justice, allowing offenders to evade prosecution and continue their harmful activities. This exploitation of diplomatic immunity not only undermines the rule of law but also tarnishes the principles of diplomacy, raising critical questions about the balance between protecting diplomatic functions and ensuring that immunity does not become a license for misconduct.[68]

2.4.2. Legal Impunity and Justice Denied

Another critical issue is the notion of justice denied to victims of crimes committed by diplomats. Article 31 of the Vienna Convention grants diplomatic agents immunity from the criminal jurisdiction of the host state, effectively shielding them from legal consequences for their actions. This legal immunity means that victims of crimes perpetrated by diplomats have limited recourse for justice, as diplomats cannot be prosecuted in the host country.[69] This situation is particularly problematic in severe cases, such as assault or other violent crimes, where the inability to hold the perpetrator accountable exacerbates the trauma experienced by the victims. The lack of prosecution opportunities in the host country often leaves victims feeling abandoned by the justice system, unable to seek redress or closure for the wrongs committed against them.[70]

In cases of civil disputes, the situation is slightly different, yet still fraught with challenges. Article 31(1)(c) of the Vienna Convention provides an exception for acts performed outside official duties, allowing for the possibility of legal action in such instances. However, the burden of proof rests heavily on the victims, who must demonstrate that the diplomat's actions were not part of their official duties. This task is daunting and often insurmountable due to the complexities of diplomatic protocols and the potential for diplomatic pressure to influence proceedings.

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[68] Id

[69] Fletcher, G. P. (1997). Reflections on the Prosecution of War Crimes by International Tribunals. Fordham International Law Journal, 21(1), 25–41.

[70] Id

Additionally, the power imbalance between the victims and the diplomatic agents can lead to further complications, making it exceedingly difficult to pursue justice.

The combination of these factors creates a significant imbalance in the justice system, where victims may feel powerless and wronged, perpetuating a cycle of injustice and impunity.[71]

2.4.3. Diplomatic vs. Functional Immunity

The broad application of diplomatic immunity has sparked considerable debate and raised significant concerns. While diplomatic immunity is intended to protect diplomats from legal action for acts performed in the course of their official duties, its application often extends far beyond this intended scope. This expansive interpretation can lead to situations where diplomats are shielded from accountability for actions that are not directly related to their diplomatic responsibilities. Such an all-encompassing application of immunity can undermine the legal systems of host countries and create opportunities for misuse. Consequently, it is crucial to understand the distinction between diplomatic immunity, which offers personal immunity covering both private and official acts, and functional immunity, which is limited to actions performed strictly within the scope of official duties.[72]

Critics argue that the current broad definition of diplomatic immunity should be reconsidered and more narrowly defined to prevent its misuse. They suggest that adopting a model based on functional immunity would be a more appropriate and balanced approach.[73] Functional immunity restricts protection to actions that are part of the diplomat's official functions, thereby ensuring that personal misconduct or activities outside the diplomat's professional duties do not enjoy the same level of immunity. This approach would help maintain the integrity of legal systems while still respecting the necessity of protecting diplomats in their official capacities. By focusing immunity on official acts, the potential for abuse is reduced, and a fairer balance is struck between diplomatic privileges and accountability.[74]

[71] Forsythe, D. P. (2019). The International Committee of the Red Cross: A Neutral Humanitarian Actor. Routledge.

[72] Goldstone, R. (2001). The Role of Prosecutions in Reconciliation. International Affairs, 77(4), 837–850.

[73] Id

[74] Id p,45

2.4.4. International Relations and Reciprocity

While diplomatic immunity is essential for the maintenance of international relations, it can sometimes lead to strained ties between countries. Diplomatic immunity ensures that diplomats can perform their duties without fear of legal harassment or coercion, fostering an environment of open and effective communication. However, this privilege is occasionally misused, with some diplomats engaging in activities that violate the laws of the host country, ranging from minor offenses to serious crimes. When such abuses occur, the host country may find itself in a difficult position, having to balance the need to uphold international diplomatic norms against the demand for justice within its own legal system. These situations often lead to diplomatic tensions, with the host country pressing for waivers of immunity to prosecute the offending diplomats.[75]

Article 32 of the Vienna Convention on Diplomatic Relations provides a mechanism for such waivers, allowing the sending state to permit its diplomats to be subject to the host country's legal jurisdiction. However, this provision is rarely invoked, as countries are often reluctant to expose their diplomats to foreign legal systems. This reluctance stems from concerns over the potential for biased treatment or political retribution. Consequently, the refusal to waive immunity can exacerbate diplomatic conflicts, creating a stalemate where neither party is willing to compromise.[76] This impasse can hinder the resolution of international disputes, as unresolved legal issues fester and contribute to a climate of mistrust and animosity between the countries involved. Thus, while diplomatic immunity is a cornerstone of international diplomacy, its occasional abuse and the challenges in addressing such abuses can complicate international relations.[77]

2.5. Challenge in investigation and prosecution of people with immunity

The investigation and prosecution of individuals with immunities, such as diplomats or high-ranking officials, present significant challenges within the legal system. These difficulties stem from the inherent conflict between the need to hold individuals accountable for criminal actions and the protections afforded by immunities, which are designed to ensure the smooth

[75] Henham, R. J. (2010). The Criminal Law of Genocide: International, Comparative and Contextual Aspects. Ashgate Publishing.

[76] Id
[77] Id

conduct of international and high-level governmental functions. Balancing respect for these legal immunities while pursuing justice requires a nuanced approach, involving complex legal frameworks and often necessitating international cooperation.

This tension underscores the broader challenge of maintaining the rule of law while respecting the diplomatic and legal norms that govern immunity.[78]

2.5.1. Evidentiary Challenges

Investigating and prosecuting individuals with immunity presents significant evidentiary challenges due to the legal protections afforded to them. Diplomatic immunity, for example, shields diplomats from criminal prosecution, creating a barrier to obtaining evidence through standard legal procedures such as search warrants, subpoenas, and interrogations. This lack of access to direct evidence can hinder the collection of crucial information needed to build a case. Moreover, diplomatic missions are considered sovereign territory, further complicating efforts to gather evidence without violating international law and potentially sparking diplomatic conflicts.[79] Prosecuting individuals with immunity also faces obstacles in the courtroom. Even if evidence is obtained, it might be inadmissible if collected in violation of the immunity provisions. Additionally, witnesses might be reluctant to testify against individuals with significant political or diplomatic influence, fearing retaliation or international repercussions. These factors can lead to a reliance on indirect evidence or the need for diplomatic negotiations to waive immunity, which is a rare and often politically sensitive occurrence. Overall, these challenges require careful navigation of both legal frameworks and international relations to pursue justice effectively.[80]

2.5.2. Political Challenges

Investigating and prosecuting individuals with immunity presents a multifaceted political challenge. Firstly, immunity, often granted to high-ranking officials or individuals in certain positions, can hinder the pursuit of justice by creating legal barriers that shield wrongdoers from accountability. This can undermine public trust in the legal system and erode confidence

[78] Dixon, M. (2013). *Textbook on international law* (7th ed.). Oxford University Press.

[79] Henckaerts, J.-M., & Doswald-Beck, L. (2005). Customary International Humanitarian Law (Vol. 1). Cambridge University Press.

[80] Id

in the rule of law, leading to perceptions of impunity and inequality before the law. Politically, addressing this issue requires a delicate balance between upholding the principle of immunity where necessary for the functioning of governance and ensuring that it does not serve as a shield for corruption or abuse of power. This balance often becomes contentious, with debates over the extent of immunity and its application, highlighting deep-seated political tensions and interests.[81] Moreover, investigating and prosecuting individuals with immunity can provoke political backlash, particularly if those individuals hold significant influence or are part of powerful institutions. Political pressure may be exerted to impede or obstruct investigations, whether through legal maneuvering, interference with evidence, or intimidation of witnesses. [82]Additionally, the decision to pursue cases against individuals with immunity can be influenced by political considerations, such as the potential impact on electoral outcomes or broader geopolitical dynamics. Navigating these challenges requires a commitment to the independence and integrity of the judiciary, as well as robust legal frameworks that ensure accountability and transparency in the face of political pressure. However, achieving this balance often requires navigating complex political landscapes and confronting entrenched power structures.

2.6. Conclusion

In concluding "The Shield of Immunity: Challenges in Prosecuting International Crimes," it becomes evident that the pursuit of justice for international crimes faces multifaceted hurdles. The chapter delineates the intricate interplay between legal frameworks, political considerations, and practical challenges that impede effective prosecution. It underscores the need for a concerted global effort to strengthen accountability mechanisms, overcome jurisdictional barriers, and address impunity. Despite the formidable obstacles delineated, the chapter also highlights promising avenues for progress, such as enhanced cooperation among states, bolstering international legal instruments, and empowering supranational bodies. Ultimately, the chapter advocates for sustained commitment and innovation in the pursuit of justice to ensure accountability for perpetrators and deliver redress for victims of grave human rights violations.

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[81] Pasqualucci, J. M. (2001). The Practice and Procedure of the Inter-American Court of Human Rights. Cambridge University Press.

[82] Id

CHAPTER 3: REMOVING THE VEIL OF IMMUNITY THROUGH INTERNATIONAL CRIMINAL LAW INVESTIGATIONS AND PROSECUTIONS OF STATE OFFICIALS AND OTHER PERSONNEL HOLDING IMMUNITIES.

3.1. Introduction

"Removing the Veil of Immunity through International Criminal Law Investigations and Prosecutions of State Officials and Other Personnel Holding Immunities," delves into the mechanisms and legal frameworks employed to hold state officials and other immunized individuals accountable for international crimes. This chapter explores the historical context and evolution of legal principles that challenge traditional immunities, emphasizing the role of international criminal law in promoting justice and accountability. It examines significant case studies and judicial precedents that have shaped the contemporary landscape, highlighting the delicate balance between respecting state sovereignty and ensuring that perpetrators of serious crimes are brought to justice.

3.2. Attributability of a conduct to the state or to the official for the purposes of immunity

As was established in Chapter 2, immunity for State officials can be either ratione personae, or ratione materiae, or both, depending on the circumstances of each case in which immunity is pleaded. [83]In practice, problems arise for officials that do not carry out the most straightforward representation of the State, e.g. as that of a Head of State. This lacuna is due to the apparent lack of specificity in the regimes governing the very wide hierarchical range of State officials. In principle, the personal scope of State immunity is to be determined by the rule of attribution of State responsibility in international law. [84]The ILC Draft Articles on State Responsibility serve as support for this conclusion.

In order of appearance, State immunity, State immunity granted to officials acting on its behalf and State responsibility conform a tripod that might prima facie seems to be woven out of intrinsically intertwined concepts in regards to the conduct generating them all.

[83] Cf. Art. 3(2), the 2004 Convention. But practice may admit into this category other high-ranking officials: R. Kolodkin, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/631, 10 June 2010, xx 7, and 94 (i)

[84] As the ILC Special Rapporteur stated in his report on this matter: «an official performing an act of a commercial nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State.»Kolodkin, x 94 (e).

It is not the purpose of this study to go in depth within these concepts, so we shall remain on the area of what is relevant for the topic at hand. As has been authoritatively stated:

«A State can only act through servants and agents; their official acts are the acts of the State; and the State's immunity in respect of them is fundamental to the principle of State immunity.»[85]

Indeed, the Draft Articles of the ILC on Responsibility of States for International Wrongful Acts were created to serve the purpose of enabling States for international accountability, [86]and in the context of this regime, the attribution of the conduct of State officials to their State is confirmed in its fourth Draft Article:[87]

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State. [88]

Accordingly, even when the impugned acts were carried out ultra vires, they are still considered to be within the scope attributable to governmental instructions - for the purpose of its immunity coverage - due to the official capacity in which the conducts were executed.[89]

Evidently, where the immunity owed to the State is assured, immunity for its State officials will follow as a corollary.[90]If the immunity of a State's government from criminal jurisdiction before foreign domestic courts is cinched under international law, then no law is likely to simultaneously withhold that immunity from those officials who have carried out the instructions of the government in question.

[85] Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another [2006] UKHL 26, Opinions of 14 June 2006, at 30 (per Lord Bingham of Cornhill).
[86] . Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp. No 10, p 43, UN Doc A/56/10 (2001), Article 1.
[87] Idem article 1
[88] Idem
[89] Idem article 7
[90] Bing Bing Jia, The Immunity of State Officials for International Crimes Revisited, 10 Journal of International Criminal Justice (2012), doi:10.1093/jicj/mqs063, p.1305

The tension in this regard emerges from the increasing cases in which the immunity of State officials has been put under the microscope in cases of violations of peremptory norms of international law. This increasing tendency of considering that the acts of the officials should not be immune, even though their governments are, brings the forum court to draw a line between the State immunity per se and the immunity of its agents,[91]thereby dismantling the notion of «State sponsored crimes».

Moreover, these Draft Articles deal strictly with the ambit correspondent to the responsibility of the State, and when it comes to individual responsibility, this regime seems to abstain from stipulating anything at all, thereby conceding that the issue must be dealt with by the regime of any person acting on behalf of a State[92]. International criminal law as lex specialis. «These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.»

3.3. The Rejection of Immunity Based on Status

History shows that the most serious crimes, such as genocide, war crimes and crimes against humanity, are almost exclusively committed by individuals with the support of the State's apparatus and avail of material resources; and this infrastructure paradoxically would seem to veil the individual's conduct under the alleged pursuance of State policies.[93]The traditional approach to determine the status of an act carried out by the State is to distinguish between the acts of a purely sovereign nature from those of non-sovereign activities, i.e. acta jure imperii and acta jure gestionis. [94]

However, it is a matter of logic and fact that no State can - nor was ever allowed - to invoke sovereignty to commit an international crime. Therefore, the abovementioned criteria is of no assistance, for they are conclusively not normal State functions, nor are they acts the State can perform in any sort of private capacity. [95]A crime is a crime, irrespective of who committed it. Any other interpretation would be erroneous and manifestly inequitable.

[91] Idem, p.1305
[92] Idem
[93] ARSIWA, Article 58.
[94] Dissenting opinion of Cançado Trinidade, at 182.
[95] Idem, at 181.

This passage is a strong expression of the position held by Lord Phillips in the Pinochet case: «An international crime is as offensive, if not more offensive, to the international community when committed under the colour of office.» [96]

It follows that any alleged «authority» to commit acts in violation of an international norm with peremptory status is naturally null and void, and such acts could never be legally ratified by any State.[97]

The abovementioned views are now increasingly claimed in legal doctrine, and also gradually finding expression in State practice, as evinced in judicial decisions and opinions, since the Eichmann case, and more vehemently, after the Pinochet judgment.[98]

Individual criminal responsibility and State responsibility for core international crimes are not mutually exclusive notions as they coexist in parallel, and there is no legal standing whatsoever for the invocation of State immunities in the face of these crimes.[99]

3.4. Individual criminal responsibility of state officials

It has been established in the previous Sections that, the acts of the State official cannot be considered to be the acts of the State for the purposes of being covered by State immunity if such acts are directed to the commission of an international wrong by that State. Moreover, acts constituting international crimes cannot legitimately be incidental to the functions of any State official. International law cannot, on the one hand, confer immunities on a functional basis to certain State officials, and on the other hand be blind to the nature of the «function» exercised by those State officials. Naturally, acts amounting to a criminal result cannot be characterized as acts in discharge of any public duty or function, nor does it give any legal standing to invoke the State's entitlement to jurisdictional immunity because international law vehemently prohibits the individual from serving the State in that manner. [100]

[96] . Pinochet Queen's Bench Appeal, at 189-190 Lord Philips
[97] Prosecutor v Furundzija, (Judgment), ICTY Trial Chamber Caase IT-95-17/1-T, 10 December 1988, at 155
[98] For an early example, see the judgment of the Israel Supreme Court in the Eichmann case, Supreme Court, 29 May 1962, 36 International Law Reports, p. 312. See also the speeches of Lords Hutton and Phillips of Worth Matravers in Pinochet n. 3, and of Lords Steyn and Nicholls of Birkenhead in
[99] e Article 1 of the ARSIWA, in relation to Article 58.
[100] Douglas, State Immunity for the acts of State Officials, British Yearbook of International Law (2012) doi: 10.1093/ bybil/brs002, Pinochet n. 1, pp 115-6.

Any claim of functional immunity to this effect fails automatically when the charge is one of committing international crimes,[101]precisely because the issue at stake is the individual's criminal liability of the person concerned for the perpetration of said crimes and not the representativeness of the State.

It is important to understand that individuals are not simply actors under international law, but they are subjects as well, and as such they are titulaires of both, rights and obligations, which emanate directly from international law as jus gentium. [102]Additionally, individuals have onuses that transcend the national obligations of obedience imposed by their State; in other words, «it is an accepted part of international law that individuals who commit international crimes are internationally accountable for them.» [103]

Moreover, the doctrine of sovereign immunities, which followed the myopia of a State-centric approach «unduly underestimated and irresponsibly neglected the position of the human person in international law, in the law of nations, droit des gens.»[104]

The scope of conducts carried out by State official that can be imputed to the State for the purposes of invoking State immunity is delimited by the norms of international law that are directed at acknowledging the criminal responsibility of individuals; and by virtue of the nature of the protected legal interest that has been vulnerated, these have attained a peremptory status within the international legal order.[105]International crimes are executed by men and women, not by abstract entities (i.e. States), and only by prosecuting the individuals who commit such crimes can the rule of law be respected. Therefore, under international law these perpetrators cannot seek to avoid the legal consequences of those anti-juridical acts by the invocation of immunities.[106]

[101] Kolodkin II, n. 1, at. 68 ff., Lord Lloyd in Pinochet n. 1, at. 74-76.
[102] International Military Judgment at Nuremberg, Judgments and Sentences, 1 October 1946, reproduced in (1947) 41 AJIL 172, at. 220-1.
[103] Pinochet n. 3, at. 151.
[104] . Jurisdictional Immunities, Dissenting opinion of Judge Cançado Trinidade at 181.
[105] International Military Judgment at Nuremberg, Judgments and Sentences, 1 October 1946, reproduced in (1947) 41 AJIL 172, 220-1.
[106] Id arrest warrant

Contemporary jurisprudence and international legal doctrine finally appear to be prepared to acknowledge the righteous duties of responsibility in the international context.[107]

It is recognized that these criminal conducts can no longer be regarded as attributable only to the impersonal State and not to the individuals who ordered or executed them, without it being unrealistic and offensive to all common notions of justice.

Conclusively, customary international law has clearly been crystalized in numerous regimes to ensure that any State official, including a Head of State, will personally be held accountable if there is sufficient evidence to conclude that, he or she, ordered, authorized, acquiesced or personally perpetrated any core international crimes.74[108]

3.5. Immunities as a Shield Against Accountability

The Court thereby justifies itself by dissociating the elements of the case and trying to convey that immunity and individual criminal responsibility are not necessarily linked concepts in international criminal law, [109]attempting to transpire that their judgment should not be construed as a factor for absolution, when criminal responsibility in fact exists and applies.

Although these arguments might sound reasonable enough, there is one undeniable problem: they over-institutionalize the concept of administering justice and leave the door wide open for impunity. What would intuitively be fair and just fades over what would appear to be technicalities when seen under the light of the maxim ubi jus ubi remedium. [110]

It would clearly amount to a substantive inconsistency and a deep-rooted failure within the international legal system if the immunities regime were to allow their use as a shield, in order to avoid the criminal responsibility of those who breach international law.[111]

[107] Stigen, Which Immunity for Human Rights Atrocities?, in Protecting Humanity — Essays in International Law and Policy in Honour of N. Pillay (ed. C. Eboe- Osuji), Leiden, Nijhoff, 2010, pp 750-751, 756, 758, 775-779, 785, 787; Panezi, Sovereign Immunity and Violation of Jus Cogens Norms, 56 Revue hellénique de droit international (2003), pp 208-210, 213- 214 ; Gaeta

[108] Brownlie, Principles of Public International Law (5th ed., Oxford, 1998) p. 517.

[109] Abi-Saab, The Use of Article 19, 10 EJIL 339, 1999, at 349. Referring to systemic norms of a legal system imposed by logical or legal necessity.

[110] Idem

[111] Idem

3.6. International criminal prosecution forums

This Section is dedicated to the development and implementation of the theoretical framework of immunities elaborated in Section I; this practical application materializes within the context of international prosecutions. A prosecution becomes international, for the purposes of this study, when the domestic courts of the nationality of the perpetrator or of territorial state where the crimes where committed are unwilling or unable to do so themselves. [112]To this effect there are two fora to carry out the prosecution of international crimes.

The first avenue consists of foreign domestic courts by way of universal jurisdiction, and the second one of International Criminal Courts and Tribunals set out by the international community. However, their existence should not be mutually exclusive, for both avenues are equally relevant in the overarching aim of ending impunity. Yet, within the context of this individual study, the analysis of foreign national courts will be succinct, for their jurisprudence and practice abide to the conventional use of immunities as explained in Section I. [113]The emphasis will be placed on the advancements regarding immunities in International Criminal Courts and Tribunals, more specifically in the International Criminal Court.

3.7. Foreign national courts and universal jurisdiction

Traditionally, national courts were the sole avenue of crime pursuit and have thus had an important role in prosecuting the perpetrators of international crimes, even if they were committed outside their borders. This is possible based on the international law doctrine of universal jurisdiction, which permits all States to apply their laws to an act «even if [it](...) occurred outside its territory, even if it has been perpetrated by a non-national, and even if [its] nationals have not been harmed by [it] (...)». [114]

While the origins and historical use of universal jurisdiction attended mainly acts of piracy, the bedrock of this doctrine lies on the premise that the perpetrators of such acts are hostis humani generis, i.e., the enemy of all mankind.

[112] Meron, Is International Law Moving Towards Criminalization? 9 European Journal of International Law 18, 1998.
[113] Idem
[114] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, at. 277.

The exercise of universal jurisdiction still abides to this description, and by means of custom and treaty, has gradually extended its scope of application to acts of genocide[115], torture, enforced disappearances, crimes against humanity, grave breaches of international humanitarian law106 and even terrorism. [116]This practice is based on the notion that some crimes are so heinous that they affect all human kind and indeed, they imperil civilization itself. Hence, it is in the interest of any and all States to prosecute those responsible for them, for as has been observed, these crimes are often committed by high officials «in the name of the State» and are therefore highly unlikely to be held accountable in their territorial State.[117]

However, given that the forum State is applying through means of its national law, international law,this does not come without obstacles. The most recurrent handi- cap to this effect is the claim of immunity as a bar to criminal jurisdiction. However, particularly in claims regarding immunity ratione materiae there is an increasing tendency to dissociate these terms,[118]«while immunity is procedural in nature... it cannot exonerate the person to whom it applies from all criminal responsibility»[119], for it is well established in international law that accountability is expected from the perpetrators of international crimes.

3.8. International courts and tribunals and the «no immunity, no impunity

In light of all of the above, in order to end the global culture of impunity, there was an undeniable need for an institutional response to the exorbitant reality of the proliferating armed conflicts. The establishment of adequate tribunals to prosecute the crimes committed within these contexts became absolutely necessary, [120]and for the sake of ensuring their success in attaining accountability, it was clear that official capacity could not bar proceedings.

[115] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, at 85.
[116] International Civil Aviation Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177, International Convention for the Suppression of Terrorist Bombings, New York 1997, 2149 UNTS 256 / 2002 ATS 17 / U.N. Doc. A/RES/52/164
[117] D. Akande and S. Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, The European Journal of International Law Vol. 21 no. 4, 2011, p. 818;
[118] Sadat, Redefining Universal Jurisdiction, New England Law Review vol.35 2001, p. 259.
[119] Bianchi, Denying State Immunity to Violators of Human Rights, 46 Austrian Journal of Public and International Law 1994, pp 227-228.
[120] Id

Impunity is defined as «the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.»[121]

To fight and end this abhorrent reality is the international's community underlying motivation to create and establish International Criminal Courts and Tribunals. Ergo, it follows that the rejection of immunities within their jurisdictions is axiomatic. Furthermore, by virtue of their own nature as supranational entities they do not abide to the principles described in Section I, as national courts do, since they derive their mandate from the international community and their operation is not subject or under the comprehension of any State.[122]

Additionally, literal exclusion any immunity claim is laid down in each one of the tribunals founding instruments, consistent with the purpose of their establishment. The International Military Tribunals of Nuremberg,[123]were the first of its kind to accomplish a successful prosecution of high State officials. The waiver of immunities was possible given the fact that the Allies were in a position of national legislators, and as such, they could adequate the applicable law to the necessity of doing so and therefore, pioneering in the endeavor of ending impunity for the most serious crimes.

«The principle of international law, (immunity) which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.»[124]

[121] Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997), at Annex II, Definitions, A.

[122] Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, at 51.

[123] Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 8 United Nations Treaty Series 279, 59 Stat. 1544 (Nuremberg Charter), Article 7.

[124] . Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), at 41-42.

It was seconded by the often forgotten International Military Tribunal for the Far East,[125]which reaffirmed the standing of its recent predecessor by providing that official capacity does not exempt criminal responsibility. From that moment on, the precedent seemed to be set in stone.

Fifty years later, when the International Criminal Tribunal for the former Yugoslavia, (ICTY) and the International Criminal Tribunal for Rwanda,[126](ICTR) were created by Chapter VII Security Council Resolutions, the exclusion of immunity for Heads of State and other government officials followed as a means to the correct execution of their mandate. Hence, this provision was identically ingrained in their respective Statutes.

«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 first time it was taken into practice was in , when the ICTY issued an indictment for Slobodan Milošević, the sitting Head of State of the Federal Republic of Yugoslavia at the time.[127]

Moreover, the ICTY declared in 2001 that Article 7(2) of its Statute reflected «the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction». To this effect the Chamber cited as support the Pinochet case and the 1996 Draft Code of Crimes against the Peace and Security of Mankind,[128] which was intended to apply to both, international and national courts.The International Law Commission clarified in this respect:

«The author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence.

[125] Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, TIAS 1589 (Tokyo Charter), Article 6

[126] Statute of the International Criminal Tribunal for Rwanda, annexed to UN Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, Article 6(2).

[127] ICTY, The Prosecutor v. Slobodan Milošević et al., Case No. IT-99-37, Trial Chamber, Indictment, 22 May 1999

[128] International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, Report on the work of its forty-eighth session, 6 May to 26 July 1996, UN Doc. A/51/10, Article 7.

It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.»[129]

The aforementioned custom also transpired in the emerging so-called «hybrid» Tribunals, which are national courts with international elements. This is the case of the Extraordinary Chambers in the Courts of Cambodia, [130](ECCC) and the United Nations Transitional Administration in East Timor Regulation establishing the Special Panel for Serious Crimes in Timor-Leste, (UNTAET) which include an explicit rejection of not only functional, but also personal immunities.

3.9. The International Criminal Court

The International Criminal Court (ICC) is a sui generis institution, for it is the first permanent and independent judicial body. Its source of creation is different from all previous International Criminal Tribunals insofar as it was established by a universal multilateral treaty, a.k.a the Rome Statute; not by a Security Council Resolution or by a Special Agreement between a State and the UN, or an agreement amongst the victorious powers or a peace treaty.[131]

Moreover, unlike the ad hoc Tribunals, the ICC's jurisdiction is deliberately non- retroactive to the entry into force of the Rome Statute, i.e. its jurisdiction is established a priori for future crimes. The Statute was conceived on July 17, 1998, yet it did not enter into force until sixty days posterior to its sixtieth ratification, which occurred on July 1st, 2002.[132]

[129] Idem, Commentary on Article 7, at 27. The Commission has consistently excluded immunity for heads of state for six decades in each of the instruments it has adopted regarding crimes under international law, beginning with the previously mentioned 1950 Nuremberg Principles, as in earlier drafts adopted in 1954 and 1991.

[130] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Cri- mes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), Article 29(2).

[131] Gaeta, Official Capacities and Immunities in The Rome Statute of the International Criminal Court: A Commentary (2002), pp 993-96.

[132] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 2187 UNTS 3, Articles 11, 24, 126.

Furthermore, this Court represents the pinnacle of a very long line of attempts to establish a specialized forum to counteract impunity for the crimes of genocide, crimes against humanity, war crimes and aggression. Nevertheless, it was established as a «last resort» mechanism,[133]abiding to the principle of complementarity.

By acceding to this treaty, States consent to avail their nationals to the jurisdiction of the Court,[134] including those who fall under the category of Article 27.

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Accordingly, the vast negotiations leading to this statutory provision constitute the digested embodiment of the evolution of international criminal law, from the viewpoint of all legal traditions around the world. Naturally including the recognition that no one, irrespective of their official capacity or rank, is above the law and immune from prosecution of these crimes.[135]By accession to the Statute, State Parties have agreed to Article 27, thereby expressly accepting that Heads of State are not entitled to immunity for the abovementioned crimes. In other words, they waived any immunity owed to their Heads of State and high-ranking officials, both before the ICC itself and before all other State Parties in respect of their cooperation with the Court.[136]

[133] Idem, Article 17
[134] Idem, Article 12(2)(b).
[135] Bringing Power to Justice: Absence of immunity for heads of state before the International Criminal Court, Amnesty International Report IOR 53/017/2010, 9 December 2010, at 19.
[136] . Amnesty International Report, at 20.

In regards to our topic of interest, once States accept the Court's jurisdiction, they ipso facto renounce the right to claim immunities. Yet, by virtue of the treaty nature of the Rome Statute, this provision will only be binding upon those State Parties that have ratified it. [137]

To this date, there are 124 State Parties to the Rome Statute, in other words, there are 72 States who are not; this amounts to a very large jurisdictional gap. [138]Therefore, there are many possible scenarios involving nationals of those non State Parties that can unfold before this Court, as was the case concerning Omar Al-Bashir; this raises the question of what would be the adequate way to deal with these situations, especially in the light of Article 98(1) of the Statute, which reads:

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

3.9.1. Inconsistency of Immunity Claims and Court Jurisdiction

To the exercise of the Court's functions: «When cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the jus puniendi of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.» [139]Any contrary conclusion would undermine the Rome Statute's mandate and circumvent Article 27, rendering it practically meaningless.

Moreover, it would be contradictory to provide that immunities shall not bar the exercise of jurisdiction by the Court while simultaneously leading way to claim such immunities as to avoid arrests by national authorities.[140]

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[137] Gaeta, Does President Al Bashir Enjoy Immunity from Arrest?, 7 Journal of International Criminal Justice, 315, 2009, pp 322-324

[138] IDEM

[139] . Akande, p. 425. Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford University Press, 2003, p. 145; Schabas, Introduction to the International Criminal Court, Cambridge University Press, 2001; Gaeta, Official Capacities and Immunities, in The Rome Statute of the Internatio- nal Criminal Court: A Commentary, Oxford University Press, (2002), p. 993-96; Wirth, pp 452-54.

[140] 8. Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, 27(2) Journal of International Criminal Justice (2009), pp 333-352.

Furthermore, according to the travaux préparatoires conducted during the negotiations of this Statute, Article 98(1) is applicable only to State or diplomatic immunity of property. It was the inviolability of diplomatic premises that was at the heart of the debate on article 98(1) and not the issue of personal immunity, which was already comprehensively dealt with in the drafting and inclusion of Article 27.[141]Withal, even if, arguendo, one were to concede that there is a tension between these provisions, there are different points to contemplate.

As a starting point and given that the Court is bound to apply first its Statute and only suppletorily recourse to principles of international law, it follows that since the Statute explicitly precludes immunity for officials, its provisions remain authoritative. [142]

Moreover, the fact that customary - or arguably merely comity - obligations to respect immunity apply solely to national courts,163 deference should be granted to stipulations under Article 27, which prevent impunity for international crimes. This interpretation is consistent with both jurisprudence and international practice.[143]

State Parties to the Court, are legally obliged by Article 86 to cooperate with the arrest and surrender of suspects when requested, thereby enhancing international cooperation.[144]Failure to comply with such ratified provisions would be a blatant obstruction of the Court's animus by encouraging impunity, and a clear breach of the international obligations set forth by the Rome Statute regime. In light of the relevant case law, the lex lata as it stands rejects immunities as a bar for prosecution of international crimes in international tribunals, which reflects a teleological compliance with the pertinent customary international law. Therefore, there could be no conflict between a request of cooperation by the Court and the requested State's alternate obligations under international law with respect to immunities,[145]because they have already been redefined by international custom.

[141] Kreß and Prost, p. 1606. Kreß was a member of the German delegation at the Rome Diplomatic Conference on the International Criminal Court and Prost was a member of the Canadian delegation.
[142] . Akande, p. 414
[143] UNGA Resolution 2840 (XXVI), 2025th Plenary Meeting, 18 December 1971, at 4; ICC Prosecutor v Al Bashir, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140, at 18, 38.
[144] Tladi, p. 200; ICC Prosecutor v. Al Bashir, at 41,43.
[145] Amnesty International Report, at 30.

3.10. Conclusion

It has been concluded that immunities have played an important role in the international legal order. Howbeit, it seems to be the case that more often than not, they are not righteously used and rather abused, to the point of inducing impunity. Herein lies the persistent struggle of balancing the different interests protected by international law, and the perpetual debate as to how to weigh them. On the one hand State sovereignty and individual State interests, and on the other hand the international collective desire for accountability and justice. Nevertheless, placing State sovereignty in this equation seems to be a mere excuse to shield State officials who commit international crimes; yet, it is an axiomatically futile premise due to the fact that clearly no State can claim that type of conduct as their own.

GENERAL CONCLUSION AND RECOMMENDATIONS

1. General Conclusion

The topic of immunity of State officials from foreign criminal jurisdiction became very important due to its essential nature for the maintenance of a system of good relations and peaceful cooperation between States. The main purpose of immunity is to protect the State from the infringement of its independence and to guarantee sovereign equality among other States through the protection of persons who act on its behalf. International relations are impossible without an effective process of communication between States. But State itself is only an immaterial and nonphysical social object which can act only with the help of its agents. As such, it is very important that those agents are able to perform their functions without any threat to be persecuted in the foreign State.

In the present thesis, two types of immunity of State officials were distinguished: personal immunity ratione personae and functional immunity ratione materiae. It was established that personal immunity is absolute in nature, which means it is applicable in respect to all acts performed by State official in question during the entire period of time when he or she holds the office. However, the lists of State officials entitled to that type of immunity is very limited and it seems that it was accorded under international law that only an incumbent Head of State, Head of Government and Minister of Foreign Affairs enjoy it because their posts assume representation of the State on the international level.

Notwithstanding, when it comes to functional or conductbased immunity, it becomes more difficult to establish rules governing it. First of all, there is no list of officials entitled to it because of the existence of a wide variety of models in different national systems. Second, immunity ratione materiae exclusively applies with regard to acts performed in an official capacity. However, it is not always easy to draw the line between “official” and “private” acts, because there are acts performed for the exclusive benefit of official committed it that had been done only due to the official status of the individual concerned, such as acts of corruption. It seems that we can consider rules governing personal immunity as wellestablished rules under international law, but in respect to immunity ratione materiae, courts should examine them on a case-by-case basis, and there is no unanimous State practice on that issue.

Another controversial issue examined in the present thesis is the topic of exceptions to the immunity of State officials from foreign criminal jurisdiction. There are different opinions with regard to that topic and the existing practice, both national and international one, shows that there is no unanimous approach that would allow stating about the existence or absence of those exceptions. It seems to be agreed, that foreign courts cannot prosecute an incumbent Head of State, Head of Government and Minister of Foreign Affairs even with regard to acts which constitute crimes under international law. This opinion reflects the support for the absolute nature of personal immunity.

However, it is more complicated to speak about possible exceptions to functional immunity. For example, with regard to international crimes, it is hardly possible to commit such criminal conduct without permission or support given by the State and they often constitute a part of the official State policy. As such, international crimes could be defined as "official" acts, and it has been concluded that acts performed in an official capacity are covered by immunity ratione materiae. Consequently, on the one hand, we have rules governing functional immunity of State officials from foreign criminal jurisdiction, and on the other hand, we have gross violations of human rights and international humanitarian law, the fight against impunity and the principle of individual responsibility for international crimes supported by the Rome Statute of the International Criminal Court and statutes of different hybrid and ad hoc tribunals.

In the contemporary world, when the conception of human rights is of significant importance for the existence of the international community as a whole, it seems incomprehensible the impunity for international crimes irrespective of the official position of its perpetrator. Notwithstanding, there is no established rule in the international law that would state about the existence of exceptions to immunity from foreign criminal jurisdiction with regard to those crimes. Nevertheless, numerous existing practice that was mentioned in the second chapter allows assuming about the presence of a certain tendency in that direction.

Nevertheless, placing State sovereignty in this equation seems to be a mere excuse to shield State officials who commit international crimes; yet, it is an axiomatically futile premise due to the fact that clearly no State can claim that type of conduct as their own.

Furthermore, the gravity and transcendence of these crimes annihilates any respect for the official capacity of who committed them regardless of their rank, and if international law is to have any value, it cannot be mocked by allowing perpetrators to escape their criminal responsibility for these heinous calculated actions under the false pretense of State immunity.

For this purpose, the international community has created International Criminal Courts and Tribunals, to operate in a complementary manner to national courts towards the overarching aim of fighting impunity. However, it must be noted that the prosecution of international crimes bifurcates when it comes to the immunities regime, inasmuch as immunity from national criminal jurisdiction seems to be fundamentally different to the immunity from international criminal jurisdiction, and therefore, the two should not be normatively linked.

nternational criminal law, stricto sensu, is the embodiment the jus puniendi of the international community as a whole, and as a matter of logic, its exercise should be thus entrusted to organs created for the purpose of representing the collective will, rather than by individual States that may jeopardize this animus, as a result of a vitiated balance of the different interests that are concomitant to their own sovereignty.

This distinction was addressed in the Eichmann case,when it was argued that «the crime against Jews was also a crime against mankind and consequently the verdict can be handed down only by a court of justice representing all mankind.» i.e. an International Court. Finally, it is evident that the perpetuation of «State sponsored crimes» is antagonistic to the very core notions of an international legal system and cardinally defeats its ultimate purpose which is the safeguard of worldwide peace and security for the sake of humanity.

As analyzed in the previous Sections, the flourishing development of international law in this regard is adequately responding in the form of custom and jurisprudence, to the increased alertness of this paradox. Hence, national and international enforcement measures must follow by consciously coalescing to put an end to impunity, and to propitiate the consolidation of a lasting respect for international justice.

The most efficient way to achieve these desired results is to raise the appropriate homogeneous awareness amongst States about the importance of this universal goal in order to achieve an interconnected system of willing States availing upright cooperation, amongst themselves and in respect of International Criminal Courts and Tribunals, for this is in practice an indispensable element to carry out their mandates.

This unprejudiced cooperation is absolutely vital for the international quest of accountability and justice to thrive; for it is our collective societal duty to shift the course of our unnecessarily violent and unadmonished history.

2. Recommendations

Enhancing the Capacity to Investigate and Prosecute International Crimes Committed by Individuals with Immunity under International Criminal Law through:

Strengthening Legal Frameworks

1. **Clarify Immunity Laws**: International law should be further clarified to distinguish between functional and personal immunities, ensuring that those in positions of power cannot exploit legal ambiguities to evade justice.
2. **Codify Exceptions**: Clearly codify exceptions to immunity for serious international crimes such as genocide, war crimes, and crimes against humanity, in international treaties and national laws.

International Cooperation

1. **Foster Collaboration**: Enhance cooperation among states, international organizations, and judicial bodies to ensure that evidence collection and prosecution are not hindered by political or diplomatic obstacles.
2. **Support the ICC**: Strengthen support for the International Criminal Court (ICC) by encouraging more countries to become state parties to the Rome Statute and by enhancing cooperation in surrendering individuals with immunity.

Capacity Building

1. **Training and Resources**: Provide specialized training for investigators, prosecutors, and judges on handling cases involving high-profile individuals with immunity. Increase funding and resources for international criminal tribunals and domestic courts to handle complex international crime cases effectively.
2. **Develop Expertise**: Foster the development of legal expertise in international criminal law within domestic legal systems to bridge gaps between national and international legal practices.

Political Will and Advocacy

1. **Promote Accountability**: Advocate for stronger political will among states to pursue justice irrespective of the political stature of the accused. Encourage civil society organizations to play a critical role in holding governments accountable.
2. **Address Political Interference**: Implement measures to reduce political interference in the judicial process, ensuring that investigations and prosecutions are impartial and based on the rule of law.

Victim and Witness Protection

1. **Enhance Protection Programs**: Establish robust programs to protect victims and witnesses who may face significant risks in cases involving powerful individuals. Ensuring their safety is crucial for the success of investigations and prosecutions.
2. **Support Victim Participation**: Ensure meaningful participation of victims in the judicial process, providing them with legal assistance and psychological support.

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