

ANALYSIS ON IMMUNITIES OF HEADS OF STATE AND THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

Numoipre, Blessing*

Abstract

This article discusses the development and usage of Head of State Immunity in International Law. The Basis of Head of State Immunity is examined with a focus on the Theories of Representative Character and Functional Necessity. It also defines the two types of Immunity; Functional and Personal Immunity. The paper extensively discusses the different measures taken to limit the scope of Head of State Immunity, which includes; the Versailles Treaty, Nuremberg trials, the Pinochet Case and the Arrest Warrant Case also the immunity of Heads of State before the International Criminal Court (ICC) and Relationship between Applicability of Heads of State Immunity and most International Crimes and the crimes that fall under the purview of the International Criminal Court. The major issue of concentration is whether Heads of State can still enjoy Immunity after committing International Crimes which falls under the Jurisdiction of the International Criminal Court. The paper aims to ascertain the extent to which Heads of State in office enjoy from Jurisdiction for International Crime. The methodology used in the paper is doctrinal; basically, from secondary sources that includes journals, online articles and textbooks. The paper concludes that the once impressive protection afforded to Head of State has eroded dramatically over time. Immunity cannot be sought before all International Tribunals, according to the International Criminal Court, under a new concept of Customary International Law, expressed in Article 27 of the Rome Statute of the ICC

1.0 Introduction

The concept of Head of State immunity, which is founded on the concepts of interstate equality and state sovereignty, was inspired by state immunity. The full extent of this immunity lasted until the middle of the 19th century. After then, the justification for the immunity changed to a principle of functional need and was instead based on diplomatic immunity.¹ While in office, diplomats are entitled to immunity, but they may still be held accountable in specific situations. Personal immunity and functional immunity are now the two types of immunity, as a result of the contrast between the immunities granted to current or past state officials. The former is based on titles and associated with formal positions. The latter, which is conduct-based and connected to the action taken, is only applicable once the state official has left office. The scope of these immunity for Heads of State is determined by customary international law.² The major issue of concentration is whether Heads of State can still enjoy immunity after committing international crimes which falls under the jurisdiction of the International Criminal Court. This has led to the reduction of the scope of Heads of State Immunity; the idea of immunity from prosecution is a holdover from a bygone era when royal family members, particularly monarchs and princes, were treated with majestic grandeur. In terms of current Heads of State and other

* BA (Niger Delta University, Bayelsa State), Masters of Arts in Law and Diplomacy in view (Rivers State University, Port Harcourt) Phone Number: 09071529165, Email: numoipreblessing@gmail.com

¹M. Mannerstrom, 'Heads of State Immunity and International Crimes' (Unpublished LLM Dissertation Lund University 2015)¹

²Mannerstrom(n1)

representatives of states, the concept of immunity from prosecution has been endorsed by international law. There have surely been numerous reports of state officials perpetrating genocide, crimes against humanity, and war crimes over the years. The scope of Head of State immunity must be limited in order to hold these criminals accountable for their actions. This paper will discuss the following sub-heads, the Immunity of Heads of State before the International Court and the Relationship between the Applicability of Head of State Immunity and most serious International Crimes which fall under the purview of the International Criminal Court.

2.0 Conceptual Framework

It is crucial to consider the meaning of relevant concepts in this paper. The key concepts to be applied in the course of this paper includes: Immunity, Head of State, Jurisdiction and Sovereignty.

2.1 Immunity

The Black's Law Dictionary defines immunity as "any exemption from obligation, accountability, or legal process; particularly one that is given to a public figure or government body."³ Immunity is a legal privilege attributed to certain persons (State officials) and recognized by national and international law which enables them to exercise their functions free from outside constraints or pressures, including legal ones. At the international level, immunity is a tool that protects the sovereignty and independence of States by preventing them or their agents from being prosecuted before foreign courts.⁴ Individuals entitled to immunity from jurisdiction can thus avoid legal pursuit before national or international courts. Parliamentarians, United Nations employees, ambassadors, and leaders of State or governments are the principal beneficiaries of this immunity. Many international treaties and customary international law have established immunity.⁵ Immunity is never absolute and is typically limited to actions taken while performing official duties on behalf of a state or sovereign. There are two main categories of Immunities recognized under international law; functional and personal immunity. Functional immunity is attached to the word "function" that is, which covers certain activities performed by the Head of State and personal Immunity is attached to the person because of their status and the office that they occupy.

2.2 Head of State

Head of State according to Dictionary of Diplomacy is defined as the person who, on the basis of a state's constitution or of other effective internal procedures, is designed as its head.⁶ Head of State, or Chief of State, is a term used in Constitutional Law, International Law, Political Science, and Diplomatic Protocol when referring to the official who holds the highest ranked position in a sovereign state and has the vested or implied powers to act as the Chief Public Representative of a State.⁷

³B A. Garner, 'Black's Law Dictionary' (9thedn, Thomas Reuters Business 2009) 817

⁴ A Camus, 'The Practical Guide to Humanitarian law' <https://www.guide-humanitarianlaw.org/content/article/3/immunity/> accessed 13th May, 2022

⁵*Ibid*

⁶G.R. Berridge and A. James, *Dictionary of Diplomacy* (Palgrave Pub. Ltd 2001)111

⁷Definition.net, What does Head of State Mean,

<https://www.definitions.net/definition/head+of+state#:~:text=Head%20of%20State%2C%20or%20Chief,public%20representative%20of%20a%20state> accessed 13th May 2022

2.3 Jurisdiction

Jurisdiction is an authority given to a body to cope up with matters related to law with some inference.⁸ A state's jurisdiction is its ability to influence people, things, and events that take place on its soil. It may be exercised through legislative, executive, or judicial actions. International law particularly addresses questions of criminal law and essentially leaves civil jurisdiction to national control. According to the territorial principle, states have exclusive authority to deal with criminal issues arising within their territories; this principle has been modified to permit officials from one state to act within another state in certain circumstances.⁹

2.4 Sovereignty

Sovereignty represents the basic constitutional doctrines of the law of nations that governs a community consisting primarily of States, having a uniform legal personality. If International law exists, then the dynamic of State Sovereignty can be expressed in terms of law.¹⁰ Several authors have tried to define the term sovereignty; the term is better described than defined, although some philosophers present the term as a rule of law made to preserve internal order and the integrity of state, and to protect the state from external interference.¹¹ However, certain authors argue that sovereignty is an organized principle of International Politics according to every state the prerogative to pursue its rights and organize internally into a form of economic integration that facilitates the development desired by the State for its citizens.¹²

3.0 Types of Crimes under International Law

The following types of crime under international law will be discussed under this sub head. This is because these category of international crimes that fall under the jurisdiction of the International Criminal Court. These crimes include; the crime of genocide, crime against humanity and war crimes.

3.1 The Crime of Genocide

Although the term "genocide" was used to reflect the atrocities of World War II, the crime has a lengthy history. The word "genocide" is a combination of the Latin word "cide," which means "murder," and the Greek word "genos" refers to a specific race or group of people. The phrase stresses the murder of a specific race or group of people as the primary focus of the crime.¹³ The Genocide Convention was adopted in 1948, providing a definition that was nearly verbatim reproduced by the Rome Statute.¹⁴ The mental component of this crime is the most important: the drive to destroy. This is significant because genocide is committed even when only one person or a small portion of the group is killed.¹⁵

⁸A. Sharma, 'Theory of Extraterritoriality of States and Jurisdiction in International Law'

<https://www.legalserviceindia.com/legal/article-3648-theory-of-extraterritoriality-of-states-and-jurisdiction-in-international-law.html> accessed 13th May 2022

⁹ Encyclopedia Britannica, 'Definition of jurisdiction in international criminal law' <https://www.britannica.com/topic/international-law/jurisdiction> accessed 13th May 2022

¹⁰ I. Brownlie, *Principles of International Law*, (5th edn, Clarendon Press, 1998) 289

¹¹ J. Bodin, *The History of Political Thought: Sovereignty* (Cambridge University Press, 1992) 23

¹² C.C. Wigwe, *International Law and Practice : the World bank, IMF and State Sovereignty* (Mountcrest University Press Pub. 2011) 17

¹³ F.F.C.C. Sweep, "the Extent of Applicability of Head of State Immunity" (Unpublished Master Thesis, International and European Law, 2013)15

¹⁴ M.D. Evans, 'International Law, Oxford (UK, Oxford University Press 2010)755-758

¹⁵ R. Cryer, 'An Introduction to International Criminal Law and Procedure' (Cambridge UK; Cambridge University Press, 2007)213

To keep hate crimes from coming under the broad definition of genocide, the ICC definition of genocide includes a "contextual element": before an act is considered genocide, there must be "a demonstrated pattern of comparable behavior," or the offender must be capable of annihilating (part of) the gang.¹⁶ Genocide is not a crime sanctioned by the government, although it can be perpetrated at any level: According to Article 33 of the Rome Statute, "Orders to commit genocide are manifestly prohibited", making it easier to accuse all ranks, including the highest.¹⁷

3.2 Crime against Humanity

Despite the fact that crimes against humanity are a broad category of offenses, they might overlap with war crimes because they were designed to remedy legal inadequacies in the treatment of war crimes. The major distinction is that discussing crimes against humanity does not necessitate a violent conflict.¹⁸ The International Criminal Tribunal Statute, the Statute for the Special Court for Sierra Leone, and the Statute of the Nuremberg International Military Tribunal all overlap but are not identical, leading to patchwork of crimes. Following that, a broadly accepted definition of the offenses was included in the ICC Statute.¹⁹ This includes "any conduct that qualifies as crimes against humanity, according to Article 7 of the Rome Statute" which must be part of a widespread or coordinated assault against a civilian population with knowledge of the attack.²⁰ There must have been a large number of casualties in this attack, thus it must have been widespread. In order to eliminate random attacks, it must also be systematic, which implies an ordered character. It must be some sort of policy.²¹ This policy-aspect of the crime creates a range of potential modes of liability for the head of State because it must be the Government's policy to carry out these acts, and by extension, the head of State's policy.

3.3 War Crimes

War crimes can be committed during both an interstate and intrastate military conflict. The "criminal phase of humanitarian law" is war crimes.²² This suggests that humanitarian law and war crimes are inextricably linked: violations of the Geneva Conventions have been criminalized.²³ While both conflicts affect the head of state, there is a difference between interstate and intrastate conflict. According to Article 8 (1) of the Rome Statute, there must be a plan or significant commission for an act to be regarded as a war crime by the ICC. The second paragraph specifically mentions (a) serious violations of the Geneva Conventions include all of the transgressions outlined in Article 8 of those treaties. The crimes based on customary law are covered in (b).²⁴ Article 8 (2) (c) of the Geneva Convention, which only applies to non-international armed conflict, penalizes infractions of its common Article 3, not your typical offenses. Infractions of Article 3 committed during a non-international armed conflict are punishable by law (e).²⁵ A large-scale commission or plan is necessary, which implies a

¹⁶*Ibid*, 208, 218.

¹⁷ Rome statute of the ICC , art 33

¹⁸Evans (n14) 230, 233.

¹⁹*Ibid*, 758, 759.

²⁰ Rome Statute art 7

²¹ Evans, (n14) 760.

²²*Ibid*, 762.

²³Cryer., (n15) 271.

²⁴Human Rights Watch, 'The Mandate of the International Criminal Court'

<https://www.hrw.org/legal/background/Africa/icc0904/2.htm> accessed 8th July 2023

²⁵*Ibid*.

chain of command and is relevant to the Immunity of Heads of State; Lower-level officials may be forced to commit these crimes by the government. In addition, the Head of State is automatically responsible for crimes done under his authority because he frequently serves as Commander-in-Chief.

4.0 Legal Framework on Immunities of Heads of State and the International Criminal Court Jurisdiction

This sub heading evaluates the following legal framework: Constitution of the Federal Republic of Nigeria 1999 (as amended), Diplomatic Immunities and Privileges Act 1962 and the Rome Statute of the International Criminal Court 1998 which governs the determination of cases at the International Criminal Court's and where such cases apply to the Immunity of Head of State or its officials.

4.1 Constitution of the Federal Republic of Nigeria 1999, (as amended)

The current Constitution of the Federal Republic of Nigeria was adopted in 1999. It is the fourth constitution since independence from the United Kingdom in October 1960 after those of 1960, 1963 and 1979.²⁶ The Constitution specifies the items over which Federal and State Governments have legislative powers.

The Constitution of the Federal Republic of Nigeria's 1999 provided for immunity clauses and it reads as follows: In spite of anything contained in this Constitution to the contrary and pursuant to this section's subsection (2),²⁷ during his tenure in office, a person to whom this section relates may not be the subject of civil or criminal actions, nor may such processes be maintained;²⁸ a person covered by this provision cannot be held or imprisoned at that time, regardless of whether they are the subject of a court order or not;²⁹ and a person protected by this section may not ask for or acquire from a court any procedure requiring or ordering the appearance of the person.³⁰ The only constraint is that the person's tenure in office will not be taken into account when determining whether the statute of limitations has run for any actions brought against him or her.³¹

4.2 Diplomatic Immunities and Privileges Act 1962

The Diplomatic Immunities and Privileges Act (DIPA) is a piece of legislation that consolidates and modifies a number of laws pertaining to diplomatic immunity and privileges.³² Subject to the provisions of this Act, every foreign envoy and every foreign consular officer, the members of the families of those persons, the members of their official or domestic staff,³³ and the members of their official staff's families would get protection from lawsuits and legal action, as well as unhindered access to their homes and official records, to the extent that each would have received such protection under Nigerian law prior to the implementation of this Act.³⁴

²⁶Constitution of the Federal Republic of Nigeria 1999

²⁷*Ibid*, s308, (1)

²⁸*Ibid*, (a)

²⁹*Ibid*, (b)

³⁰CFRNs 308(c)

³¹*Ibid*, s.308(1)

³²Diplomatic Immunities and Privileges Act , 1962

³³*Ibid*, Part 1, s1 (1)

³⁴*Ibid*

4.3 Rome Statute of the International Criminal Court, 1998

Heads of State and Governments gathered in Rome for the conclusion of the diplomatic conference opted to establish a permanent International Criminal Court on July 17, 1998, following three years of negotiations and a difficult final five-week negotiating session.³⁵ By a resounding 120 votes in favour, 21 abstentions, and only 7 votes against, the worldwide community of states decided to support this crucial organization for bringing the world's greatest human rights violators to justice.³⁶ If the ICC receives 60 ratifications, it will be formed with enormous potential as an instrument of international justice and a deterrent against subsequent atrocities.³⁷

The core of the ICC treaty is its jurisdictional sections. When a state ratifies a treaty, it admits that all offenses covered by the pact fall under the Court's purview. According to the statute's requirements for exercising jurisdiction.³⁸ The Court is granted jurisdiction over the offences listed in Article 5 of this Act when a State ratifies this Statute, acknowledging this fact.³⁹ Hence, it is not feasible for a state party to consent to have jurisdiction over some offences but not others or to be obligated to do so, on an individual basis.⁴⁰

The transitory clause of Article 124 is the sole place where automatic jurisdiction for state parties does not apply.⁴¹ States may deny the court's jurisdiction for war crimes committed on their soil or by inhabitants of those states for a period of seven years after the Act enters into force with respect to that state in particular. But, states must decide whether to use this option, and ideally not many will. While such a provision is legally and morally unjustifiable, distinguishing as it does between war crimes and others, the opt out is limited to a non-renewable period of 7 years.⁴²

According to Article 15 of the ICC Statute, the prosecutor may also investigate criminal accusations based on information provided by victims, non-governmental organizations, or any other trustworthy source, besides those from state parties and the Security Council.⁴³ Given the prospect of state and Security Council opposition to sending the matter to the Court, we thought this was critical. Moreover, the ex officio provisions are arguably the most important of those that give the victim and survivors a role in the ICC process, by enabling them to trigger investigations.

5.0 Basis of Head of State Immunity

Head of State Immunity can be better explained through the Theories of Representative Character and Functional Necessity. The Representative Character hypothesis dates back to a time when the sovereign was an intimate part of the state, as King Louis XVI of France said in the 17th century; “*L'Etat*’

³⁵ Human Rights Watch, ‘Summary of the key Provisions of the ICC Statute’<https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute> accessed 20th June 2022

³⁶*Ibid*

³⁷*Ibid*

³⁸Rome statute of the International Criminal Court 1998

³⁹*Ibid*, art 12(1)

⁴⁰Human Rights Watch (n22)

⁴¹Rome Statute(n38)

⁴²*Ibid*, art 124

⁴³*Ibid* art 15(1)(2)

est moi”.⁴⁴ The theory holds that immunity can be linked to the state’s sovereignty.⁴⁵ This theory combined with the previously mentioned *par in parem non habet imperium*, formed the foundation for early laws of Head of State immunity.⁴⁶ The functional necessity theory was developed during the previous century as an extension of the representative character theory.⁴⁷ It is founded on the idea that in order for Heads of State to effectively carry out their duties they must be immune from legal authority of other states. The immunity itself is linked to the action taken, not the person doing it.⁴⁸ The functional necessity defense is being utilized to maintain the immunity of Head of State.

Under international law, the chief representative of the state, the Head of State, has the authority to act on the state's behalf.⁴⁹ As a result of the importance of the state's proper operation, the concept of Head of State Immunity evolved as a personal shield against the authority of other governments. Though, according to international law, immunity belongs to the state, not the head of state individually.⁵⁰ Because of the state's independence and the safeguarding of its prime representative's rights to carry out international tasks, one state cannot exercise jurisdiction over the head of another without the latter's approval.⁵¹ The functional necessity theory and the representational character theory, the latter of which evolved from the former, are the two primary groupings into which the historical rationale for Head of State immunity can be separated.⁵²

6.0 Immunity of Heads of State under International Law

According to the concept of immunity from prosecution in International Law, some individual are basically immune from punishment for crimes committed while working as Heads of State or representatives of other foreign powers.⁵³ Functional immunity and personal immunity are the two categories of immunity from prosecution. Immunity *rationemateriae*, also known as functional immunity, shields people from prosecution who carry out specific governmental tasks.⁵⁴ Both international treaty law and custom support functional immunity, which normally covers foreign officials or diplomats working on behalf of a sending government.⁵⁵ Some people are granted personal immunity, commonly referred to as *ratione personae*, as a result of their employment with the government. It is a well-established legal principle that current Heads of State, Presidents, and Foreign Ambassadors all automatically enjoy *ratione personae*.⁵⁶ At this point, it should be understood that

⁴⁴ A. Watts, ‘The legal Position In International Law of Heads of State, Heads of Government And Foreign Ministers, Recueil Des Cours, (Vol. 247, 1994)35

⁴⁵ J.C. Barker, ‘International Law and International Relations’ (2000) 164

⁴⁶ Watts (n44)36

⁴⁷ Barker(n45)164

⁴⁸ *Ibid*

⁴⁹ H. Fox, ‘the law of state immunity’ (2002)427

⁵⁰ Watts (n44)

⁵¹ Fox (n49)

⁵² Barker (n45)

⁵³ D. Akande and S. Shah, ‘International crimes, state officials’ immunity, and domestic foreign courts (2010) 12(4) *European Journal of International Law*

⁵⁴ *Ibid*

⁵⁵ R. Mazzeschi, ‘Problems of International Law: The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Conventional Theory (2015). The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories, available at: <http://www.qil-qdi.org>, accessed 20th October 2022.

⁵⁶ Democratic Republic of the Congo v. Belgium, Case Concerning the Arrest Warrant of 11 April 2000 ICJ Reports 1. <http://www.icjci.org/en/case/> accessed 20th October 2022

ratione personae, only applies during an individual's term in office.⁵⁷ Those who formerly had the privilege of *ratione personae* may now face punishment for offenses committed while holding public office shortly after leaving government.⁵⁸ The principle of non-interference or non-intervention in another state's internal affairs justifies the presidents' entire immunity from criminal prosecution.⁵⁹

6.1 Personal Immunity

The doctrine and purpose of immunity *ratione personae* (Personal Immunity) comes from the idea that by granting the state officials, representing the state at the international level, with such immunity, the smooth conduct of international relations can be ensured. This is because within the relations and cooperation between states it is highly important that they can negotiate with each other freely.⁶⁰ The purpose of personal immunity therefore can be explained as to “ensure respect for the principle of the sovereign equality of states, prevent interference in their internal affairs and facilitate the maintenance of stable international relations by ensuring that the officials and representatives of States can carry out their functions without external difficulties or impediments”.⁶¹ To fulfill a smooth conduct of cooperation and communication it is thus necessary to ensure that the state officials are able to perform their functions effectively. That means they can perform their functions without the possibility or fear of their arrest, detention or other treatments that would endanger or limit the ability to perform the state agents' function.⁶² In other words, the immunities *ratione personae* are essential for the maintenance of a system of peaceful cooperation and co-existence among states. As Akande and Shah further pointed out, in today's world, where global cooperation is being increased, the personal immunity is especially important.⁶³

Personal Immunities is attached to the persons because of their position which cover all acts performed by those who benefit from the immunity and last while the persons concerned remain in office. Immunity may be lifted in the case of grave violations by the political or legal entities that control the various official functions.⁶⁴ A number of state officials enjoy Personal Immunity because these individuals are immune from the jurisdiction of foreign courts as a result of their official position with the state.⁶⁵ The rules recognize the inviolability of Heads of State and diplomatic personnel, and they apply first and foremost to them but it has also been expanded to cover additional formal positions, such as foreign ministers.⁶⁶ Personal Immunity is justified by the operation of international relations since state officials must be able to work and travel in order to accomplish their official tasks.

⁵⁷*Ibid*

⁵⁸*Ibid*

⁵⁹M. Jamnejad and M. Wood, 'The principle of non-intervention; Leiden *Journal of International Law* 22(2) 2009)

⁶⁰A. Bajzikova, 'Personal Immunities in the Proceedings before the International Criminal Court'(Unpublished Thesis, Masaryk University 2018)15

⁶¹Bajzikova (n60)

⁶²*Ibid*

⁶³D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' :*European Journal of International Law*(2011) 825

⁶⁴*Ibid*

⁶⁵V. Alebeek, The Immunity of State and their Officials in International Criminal Law and International Human Rights Law (2008)158

⁶⁶Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), Judgement, ICJ Reports 2002

The concept of Personal Immunity was extended to Head of State by borrowing it from diplomatic law.⁶⁷ Article 29 of the Vienna Convention on Diplomatic Relations from 1961 could be used as a guide.⁶⁸ It provides that “a diplomatic agent's person is inviolable; he is not subject to any sort of arrest or detention.” The code of customary international law, provides thus provides that a diplomatic agent is exempted from the receiving State's criminal jurisdiction, according to Article 31.⁶⁹ Personal immunity for leaders of state is now universally accepted, despite its origins in diplomatic law.⁷⁰

It should be noted, that Personal Immunity provides a state official with a procedural defense in criminal proceedings in another state and is related to procedural law.⁷¹ It does not rule on whether the official's actions were legal. Criminal accountability and immunity for an individual are very distinct ideas.⁷² In actuality, the sole aim of personal immunity is to shield people from other governments' legal authority for actions they are liable for.⁷³

6.2 Functional Immunity

Functional Immunity is attached to the word function that is, which cover certain activities performed by various State officials, and which survive till the end of office. The defence given by the act's official nature, which shields state officials from the jurisdiction of foreign national courts, is known as functional immunity.⁷⁴ It is founded on the premise that a state official is not liable to other states for actions performed while carrying out official tasks, and that these activities must instead be credited to the state.⁷⁵ It is not title-based, as is personal immunity, but rather conduct-based. Because functional immunity relates to the activity rather than the state official, you can rely on it if you've represented the state in any way.⁷⁶ It functions as a method of delegating accountability to the government. This is true even if the official violated the law, as international law prohibits governments from judging whether a state official of another country acted lawfully. The only state with the power to decide on this is the home state.⁷⁷

Despite the fact that acts are related to the state, the law of state immunity does not include functional immunity.⁷⁸ When the crime is thought to have been committed by the state, functional immunity provides a substantive defense to a Head of State in criminal proceedings in another state. This is how Functional Immunity is related to substantive law.⁷⁹ So, the immunity endures the duration of the representative's official duties.⁸⁰

⁶⁷A. Watts (n41)61

⁶⁸Vienna Convention on Diplomatic Relations (VCDR) 1961, art 29

⁶⁹*Ibid*, art 31

⁷⁰Alebeek(n52) 169

⁷¹A. Cassese, *Congo v. Belgium Case*, EJIL, (Vol. 13 No. 4, 2002)864.

⁷²Arrest Warrant (n 68)

⁷³Alebeek (n52) 266

⁷⁴*Ibid*, 226

⁷⁵*Ibid* 239

⁷⁶D. Akande and S. Shah, International Crimes, Foreign Domestic Courts, and Immunities of State Authorities, EJIL (Vol. 21, No.4.), 825.

⁷⁷Alebeek(n52)329

⁷⁸Akande and Shah (n 50) 827; V. Alebeek, 'In international criminal law and international human rights law, states and their officials are immune from prosecution'114

⁷⁹Akande (n76)

⁸⁰VCDR (n68), art 39 (2)

7.0 Reduction of the Scope of Head of State Immunity

The idea of Immunity of Head of State from prosecution is a holdover from a bygone era when royal family members, particularly monarchs and princes, were treated with majestic grandeur. In terms of current Heads of State and other Representatives of States, the concept of immunity from prosecution has been endorsed by International Law. There have surely been numerous reports of state officials perpetrating genocide, crimes against humanity, and war crimes over the years; this necessitated the need for the reduction of the scope of Head of State immunity, these immunities must be limited in order to hold the criminals accountable for their actions before the International Criminal Court which will be discussed in next sub-head. Others are the Versailles Treaty, Nuremberg Trials, Pinochet Case and the Arrest Warrant are the few early measures that were taken to limit the Scope of Heads of State Immunity.

7.1 The Versailles Treaty

The clauses of the Versailles Treaty, which subjected Heads of State to criminal prosecution, were the first indication of a willingness to challenge the deeply ingrained theory of head of state immunity.⁸¹ The signing of the treaty signaled the conclusion of World War I and the Central Powers' ultimate defeat⁸² by the Allied Powers.⁸³ As a result of the treaty's requirement that Germany bear full responsibility for the war, Article 227 stipulated for William II de Hohenzollern, the former German Emperor, to be publicly tried before a jury of five judges drawn from the Allied Powers' member countries.⁸⁴ "The monarch was to stand trial for "a great violation against international morals and treaty integrity"⁸⁵ and the trial's "compass" was to be the "highest motives of foreign policy."⁸⁶ The assumption that Germany alone was to blame for the war and its consequences, which permeated the Versailles Treaty, was reflected in Article 227. As was to be expected, the Germans strongly opposed the former Kaiser's planned trial and refused to accept that they were the only ones responsible for starting the war.⁸⁷ The Netherlands refused to extradite William II, who was living in exile there, for trial, resulting in the termination of the intended trial.⁸⁸

The planned trial of the Kaiser, on the other hand, has garnered criticism for a variety of reasons, the most fundamental flaw is that it is based on "international policy" rather than international law. Some have claimed that the proposed trial would have violated the basic norm of criminal law established by the doctrine *nullum crimen sine lege* if it had been based on international law.⁸⁹ This provision restricts prosecution to offenses that were previously recognized by written law at the time of the offense and were a component of the Allied Powers' national legislation at the time of the Versailles Treaty.⁹⁰

⁸¹P.A.Oyugi ' Head of State Immunity under the Rome Statute of the International Criminal Court' (Unpublished Master's Thesis, Rhodes University 2015)

⁸²*Ibid*

⁸³*Ibid*

⁸⁴the Versailles Treaty 1919, art 231-248

⁸⁵*Ibid*, art 227.

⁸⁶*Ibid*

⁸⁷Brockdorff -Rantzau, "the Treaty of Versailles" <http://www.armchairgeneral.com/forums/showthread.php?t=127626> accessed 20th October 2022

⁸⁸ C. Tomuschat "The Legacy of Nuremberg" (2006) 4 JICJ 830 at 831.

⁸⁹ S. E Baldwin, "The Proposed Trial of the Former Kaiser" (1919) 29 *The Yale Law Journal* 75.

⁹⁰*ibid*.

Nonetheless, some consider this arraignment as the first step toward breaking the head of state immunity provision established by customary international law.⁹¹

7.2 Nuremberg Trials

At the end of World War II and the signing of the London Agreement, the idea of head of state immunity faced its next critical test.⁹² The victorious countries, this time the Allies, have done it again,⁹³ were united against Germany.⁹⁴ The Nuremberg Charter was annexed to the London Accord,⁹⁵ which created the International Military Tribunal (IMT) in order to ensure that "the top war criminals from the European Axis countries being tried fairly and promptly, and being punished."⁹⁶

Three categories of crimes were set down in the Nuremberg Charter: war crimes, crimes against peace, and crimes against humanity.⁹⁷ These have been designated as global crimes or fundamental crimes. "The defendants' Positions as Presidents of States shall not be regarded as minimizing their culpability or reducing their punishment," declares Article 7 of the Charter.⁹⁸ In addition, Article 8 stated that a defendant's compliance with government directives did not absolve him of criminal responsibility but could result in a less punishment if the Tribunal deemed it appropriate.⁹⁹ Many senior German officers were tried, found guilty, and sentenced at the IMT as a result of Articles 7 and 8 of the Nuremberg Charter.¹⁰⁰ For the first time ever, senior representatives of a sovereign state were found guilty of carrying out commands.

The Nuremberg Tribunal has been chastised for a number of reasons, including its composition (all of the judges were from the Allied Powers), jurisprudence, and discriminatory jurisdiction.¹⁰¹ Others have referred to the Nuremberg trials as a veneer of legitimacy derived from the victor's claim to justice.¹⁰²

Notwithstanding the resistance, the International Law Commission endorsed the Nuremberg Charter and the Tribunal's international law principles,¹⁰³ and Resolution 95 of the United Nations General Assembly later confirmed this.¹⁰⁴ In fact, according to Nuremberg Principle III, Committing an international crime while acting as the head of state or government does not free that person of criminal liability under international law, has been taken into account in successive international criminal

⁹¹ Amnesty International "The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity" www.amnesty.org/es/library/asset/.../eur450211998en.pdf accessed 20th October 2022

⁹² The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) <http://www.icrc.org/ihl.nsf/INTRO/350?OpenDocument> accessed 25th October 2022

⁹³ Oyugi (n81)

⁹⁴ *Ibid*

⁹⁵ The Charter of the International Military Tribunal- Annex to the London Agreement 1945

⁹⁶ *Ibid*, art 1

⁹⁷ *Ibid*, art 6

⁹⁸ Nuremberg charter 1945, art 7

⁹⁹ Nuremberg Charter (n85), art 8

¹⁰⁰ "Famous World Trials: the Nuremberg Trials"

<http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nuremberg.htm> accessed 25th October 2022

¹⁰¹ J Dugard International Law A South African Perspective (4th edn 2011) 320; Tomuschat 2006 JICJ 833.

¹⁰² M Gordon "Justice on Trial: The Effectiveness of the International Criminal Tribunal for Rwanda," 1 ILSA *Journal of International & Comparative Law* 217, 224 (1995).

¹⁰³ Oyugi (n81)

¹⁰⁴ *Ibid*

tribunal founding legislation.¹⁰⁵ Functional immunity, which usually shields an official from actions taken while serving in that capacity, is nullified in this position.

This position was upheld in the Eichmann case¹⁰⁶ notwithstanding the fact that the Israeli Court declared that those who committed international crimes while acting in their official position would face prosecution; it highlighted the incorporation of the Nuremberg Principles into international law.¹⁰⁷ The identical finding was drawn in the Blaskic case and in the Arrest Warrant case by dissenting justices.¹⁰⁸ Scholars believe that the notion that functional immunity does not shield persons accused of international crimes has gradually evolved into a new concept of customary international law.¹⁰⁹ As a result, committing alleged crimes while in office does not absolve a person of criminal liability. Former Heads of State, as well as prominent state officials, could face prosecution for crimes against humanity committed while in office. The Pinochet case reinforced the idea even further.

7.3 The Pinochet Case

Due to claims of torture, Spain requested that the United Kingdom extradite former Chilean President Augusto Pinochet in this case under the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (hence the "Convention against Torture").¹¹⁰ Following his detention, Pinochet sought judicial review with the Divisional Court, attempting to have the warrant order reversed. The Divisional Court granted Pinochet immunity as a former leader of state.¹¹¹ According to the finding of six of the seven Law Lords hearing the appeal, Pinochet was refused immunity because he was a former Head of State. The Law Lords held that because international crimes are already prohibited by international law, they cannot be considered official actions for the purposes of international law and are hence not protected by Functional Immunity.¹¹² Only Lord Goff could persuade others otherwise. He said regarding granting Pinochet immunity: "obviously, even though the conduct is significant, the fact that the action is illegal alone does not exclude one from immunity."¹¹³

Though, according to most academics, when someone is charged with a global crime under international criminal law, Functional Immunity is no longer a consideration, and Lord Goff's ruling in this regard hasn't gotten much attention.¹¹⁴ The *Institut de Droit International* (IDI) agreed in its 2009 Resolution

¹⁰⁵Article 6 of the Tokyo Tribunal's Statute, Article 7(2) of the International Criminal Tribunal for Former Yugoslavia's Statute, Article 6 (2) of the International Criminal Tribunal for Rwanda's Statute, and Article 27 of the International Criminal Court's Rome Statute, Article 6 of the Special Court of Sierra Leone's Statute.

¹⁰⁶*The Attorney General v Adolf Son of Karl Adolf Eichmann*, in The District Court of Jerusalem Criminal Case No. 40/61 http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_district.pdf accessed 25th October 2022

¹⁰⁷Oyugi (n81) 28

¹⁰⁸*Ibid*

¹⁰⁹Cassese International Criminal Law 267.

¹¹⁰Oyugi, (n68)

¹¹¹*R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No. 1) 1998 (4) All ER 897.

¹¹²Pinochet (No. 3) at 114-115 (per Lord Wilkinson), 151-152 (per Lord Hope) at 189-190 (per Lord Phillips).

¹¹³ Pinochet (No.3)119 (per Lord Goff).

¹¹⁴Akande (2004) AJIL 413; A Cassese When May State Officials be Tried for International Crimes? Some Comments on the Congo VBelgium Case (2002) 13 EJIL 853 at 864; Wirth 2001 Criminal Law Forum 433.

on the Immunity of Heads of State.¹¹⁵ "No exemption from jurisdiction, other than personal immunity in accordance with international law, applies to international crimes," reads Article III of the Resolution.

As previously stated, international Criminal Law is rapidly working its way around heads of state's formerly well-established immunity. To begin, as previously stated, Functional Immunity is no longer recognized as a defense to prosecution for crimes committed overseas.¹¹⁶ Foreign crimes are no longer considered official activity for which functional immunity exists; hence a person is now criminally responsible for crimes committed while in government. Personal immunity is granted to a head of state while he or she is in office, but it expires when the person leaves the position. At that point, the individual could be held liable for international crimes committed both before and during that time period.¹¹⁷

This practice has led to charges of crimes committed while in office being brought against former state and administration leaders as well as other prominent state officials.¹¹⁸ As demonstrated below, the prosecution of former Heads of State has the support of most nations. The present Heads of State and government, as well as other key state officials, have yet to reach such an agreement. This was demonstrated by the Arrest Warrant case.¹¹⁹

7.4 The Arrest Warrant Case

In the Arrest Warrant case, a Belgian investigative court issued an arrest warrant for Yerodia, the Congolese Foreign Affairs Minister at the time, charging significant violations of the four 1949 Geneva Conventions and their 1977 Protocols, as well as crimes against humanity.¹²⁰ The arrest warrant was sent to Interpol, which spread it around the world. The Republic of Congo asked the International Court of Justice to rule on whether Belgium's actions in obtaining an arrest warrant for a Congolese minister violated Congo's immunity. Yerodia had resigned as Minister of Foreign Affairs and had no other work in the DRC at the time of the judgment.¹²¹ Yet, the International Court of Justice approved Congo's plea, saying that high-ranking persons, such as heads of state and government, are exempt from the ban, Foreign ministers, for example, were entitled to protection from both civil and criminal national jurisdiction.¹²²

The ICJ stated that in some circumstances, the immunities acquired under International Law do not constitute a bar to criminal prosecution. In some international criminal courts where jurisdiction exists, a current or former Foreign Minister may face criminal charges.¹²³

As a result, regardless of the offences charged, the judgment states that; Heads of State and other senior state leaders enjoy immunity in international courts. The International Court of Justice, on the other

¹¹⁵Resolution on the Immunity of the State and Individuals Acting on the State's Behalf from Jurisdiction in Cases of Foreign Crimes (2009).

¹¹⁶Oyugi, (n81)

¹¹⁷*Ibid*

¹¹⁸*ibid.*

¹¹⁹Case Concerning The Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) 2002 3 ICJ.

¹²⁰Oyugi, (n81)

¹²¹*Ibid.*

¹²²*Ibid*

¹²³*Ibid*

hand, claims that "certain" international tribunals that fall within their purview are not covered by the same immunity which includes the International Criminal Court.

8.0 The International Criminal Court

The International Criminal Court is a permanent international court established to investigate, prosecute and try individuals including Heads of State accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.¹²⁴ Some of the most heinous crimes were committed during the conflicts which marked the twentieth century. Unfortunately, many of these violations of international law have remained unpunished. The Nuremberg and Tokyo tribunals were established in the wake of the Second World War.¹²⁵ In 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognized the need for a permanent international court to deal with the kinds of atrocities which had been perpetrated. The idea of a system of international criminal justice re-emerged after the end of the Cold War.¹²⁶ However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of the former Yugoslavia and in Rwanda. In response to these atrocities, the United Nations Security Council established an *ad hoc* tribunal for each of these situations. These events undoubtedly had a most significant impact on the decision to convene the conference which established the ICC in Rome in the summer of 1998.

8.1 Immunity before the International Criminal Court

Article 27 of the Rome Statute is one of the most recent sections outlining the inapplicability of immunity based on official capacity before international criminal tribunals.¹²⁷ Article 27 (2) provides that "in addition to the law on individual criminal liability, immunities or special procedural procedures which may apply to a person's official status, "The court may exercise jurisdiction over such a person whether they are subject to domestic or international law."¹²⁸ The use of immunity and other procedural safeguards is not expressly limited by earlier international tribunal legislation, which stop at extending criminal culpability to everyone.¹²⁹ Only functional immunity was discussed in the first paragraph, which means that if someone commits a crime while functioning in an official capacity, the act is attributed to the person, not the state, and the person can be held accountable. As a result, former Heads of State were only tried by the international tribunals listed above after their Personal Immunity had ended.¹³⁰ Nonetheless, article 27 (2) Rome Statute tackles personal immunity for the first time, making sitting Heads of State and government, as well as any state officials who are normally exempt from prosecution, subject to the International Criminal Court's authority¹³¹ to be liable for crimes committed while in office.

¹²⁴ Understanding the International Criminal Court, <https://www.icc.cpi.int/sites/default/files/publication/understanding-the-icc.pdf> accessed 8th July 2023

¹²⁵ *Ibid*

¹²⁶ *Ibid*

¹²⁷ Rome Statute, art 27

¹²⁸ *Ibid*, art 27(2)

¹²⁹ Oyugi, (n81), 45

¹³⁰ *ibid*.

¹³¹ Human Rights Watch, (n 24)

8.2 Applicability of the Immunity

Immunity applies to all claims made before a court whether (foreign national courts and international courts such as the ICC and the Tribunals) within and throughout all jurisdictions. Immunity is applicable for all legal claims made, based both on public (criminal) law, civil law and on both national and international law.¹³² There is however a difference made between the immunity before a foreign court and the ICC. As said, immunity within the proceedings before a national court is dominated by customary international law, while the proceeding before the ICC is dominantly prescribed in the Rome Statute. Any sort of breach of any type of law can be the reason to bring a Head of State before a court and therefore can trigger the immunity. Head of State will be hampered in the exercise of their duties when there is a possibility to be detained, therefore the prohibition to exercise criminal jurisdiction is absolute.¹³³ In this paper, the reach is limited, since only the most appalling crimes will be looked at: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Only these crimes are looked at, since these crimes form a “post – Pinochet” exception for immunity *ratione materiae* and are the most serious international crimes. However, contrary to the Pinochet case, these officials committing these crimes remain to be protected in an absolute fashion under immunity *ratione personae*, causing the implications to be different, creating an interesting relationship between Head of State immunity *ratione personae* and these crimes, in the light of the Rome Statute and Customary International Law.¹³⁴

8.3 Relationship between Applicability of Head of State Immunity and most serious International Crimes

The extent of the offense and how it relates to the immunity must be determined in order to ascertain if *ratione personae* immunity covers the Head of State when a significant international crime is committed.¹³⁵ It is crucial to comprehend the gravity of these offenses in light of the requirement for immunity. Even if they exceed the suffering caused by international conflicts, “both numerically and qualitatively,” Victimization on a “systematic and vast scale” on a non-international playing field results from the most egregious offenses under international criminal law.¹³⁶ Genocide, crimes against humanity, war crimes, and aggression are examples of such crimes. These crimes are all major abuses of generally acknowledged human rights, and the overarching message is that those guilty for these murders must face justice.¹³⁷ When a crime “endangers humanity's peace and security and shocks humanity's conscience,”¹³⁸ It's commonly considered to be a part of coercive law. These are essential elements of customary international law that cannot be changed or ignored. They are occasionally known as *jus cogens* norms. These conditions must be met and are critical. Genocide, crimes against humanity, war crimes, aggression, torture, piracy, slavery, and other slave-related activities are all considered *jus cogens*. Recognizing these crimes as such has major ramifications: It imposes a responsibility on the entire world community to prevent those who commit these crimes from receiving

¹³²F.F.C.C. (n 13)

¹³³*Ibid*

¹³⁴F.F.C.C. (n13)

¹³⁵*Ibid*

¹³⁶M.C. Bassiouni, *International Criminal Law*, (Leiden, NL: MartinusNijhoff Publishers 2008) 3.

¹³⁷*Ibid*

¹³⁸*Ibid*, 15

impunity on both a national and international scale¹³⁹: The international community as a whole bears responsibility for putting a halt to these crimes because all nations have a (legal) incentive to do so. They get greater significance as a result¹⁴⁰ yet, the immunity *ratione personae* principle is difficult.

Individual criminal culpability can be broadened through different types of liability. The perpetrators of the crime, known as "footmen," who are situated at the base of the food chain, are also accountable, yet even if they don't cause any physical harm to anyone, the puppet masters in the background can still be held liable.¹⁴¹ Even though these Heads of State were not present when the crime was actually committed, the law nonetheless allows for ways to hold them accountable. Ordering, soliciting, causing, aiding, abetting, helping, and "in any other manner contributing" are the several categories of guilt, according to Article 25 (3) (b) through (3) (d) of the Rome Statute¹⁴². The responsibility could range from directly issuing the commands without the option to refuse to specifically approving others performing the offenses¹⁴³. Some sorts of culpability are also immune from prosecution, which is especially important because a head of state is more likely to be held guilty extended liability than by performing the offense themselves. The nature of each crime (genocide, crimes against humanity, war crimes, has been extensively discussed earlier in this paper, as it gives a better understanding of these International Crimes that can be perpetuated by a head of State¹⁴⁴ Knowing the gravity of these crimes is critical to comprehending how they can be an exception to the Immunity of the Head of State: this may assist to understand the conflict between (*de facto*) impunity and immunity: immunity serves a clear function on the one hand, but it also allows these acts to go unpunished on the other.

9.0 Conclusion

This paper revealed that the once-impressive protection afforded by head of state immunity has eroded dramatically over time. Throughout the last century, International Criminal Court has recognized individual criminal liability, with the International Criminal Courts jurisdiction not being restricted by a person's official capacity at the time of the action. It is also apparent that the ICC has its limitations and it is clear that Head of States can commit serious crimes against International Law and be granted Impunity. This paper has shown Heads of States have actually been held responsible for their actions during this time period. Also change does not happen overnight. It was stated in the Arrest Warrant Case; the law is in constant evolution, with the discernible trend to limit immunity and strengthening accountability, this suggests that impunity may come to an end in the future.

¹³⁹*Ibid*

¹⁴⁰Bassiouni (n136)

¹⁴¹ F.F.C.C. (n13)

¹⁴²*Ibid.*

¹⁴³*Ibid*

¹⁴⁴*Ibid*