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Removing Head of State Immunity: Utilizing Domestic Courts to Promote Access to Justice

Aya Tochigi

Introduction

Under old customary international law, a state enjoyed absolute foreign sovereign immunity because of the equality among states in the international community.¹ No state could subject another state under its judicial system. Similar to foreign sovereign immunity, head of state immunity was absolute without any exception,² and developed into two types of immunities, functional immunity or immunity *ratione materiae*, and personal immunity or immunity *ratione personae*.³

Functional immunity attaches to the official function of the head of state.⁴ The head of state acts on behalf of its state when he performs his official duties, so that the courts cannot hold the head of state liable for the state's act.⁵ Functional immunity applies to both sitting and former heads of state, as long as the acts in question fall under the official function as a head of state.⁶ In other words, the head of state has absolute immunity from prosecution when he takes a certain actions as his official conduct. On the other hand, a head of state has personal immunity merely because he holds the official status.⁷ Since personal immunity protects a head of state from civil or criminal liability for acts committed under his personal capacity, the personal immunity

¹ Jerrold L. Mallory, Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings, 86 Colum. L. Rev. 169, 170 (1986).

² Mark A. Summers, Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to the Statute of the International Criminal Court, 31 Brook. J. Int'l L. 463, 466 (2006).

³ Dapo Akande, International Law Immunities and the International Criminal Court, 98 Am. J. Int'l L. 407, 409-415 (2004).

⁴ Dapo Akande & Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 Eur. J. Int'l L. 815, 825-28 (2010) [hereinafter Immunities of State Officials].

⁵ Id.

⁶ See 98 Am. J. Int'l L. 407, 412-14.

⁷ Id.

disappears once he is no longer the head of state.⁸ Personal immunities developed in order to allow state officials, including heads of states, to freely go abroad in order to perform his official duties without a fear that his personal conducts may subject himself to another state's criminal or civil liability.⁹

In the twentieth century, the international community started to recognize exceptions to foreign sovereign immunity, such as commercial and tort exceptions.¹⁰ Similarly, head of state immunity has become more restrictive as a trend in the international community. For example, a former head of state may not claim immunity for international crimes in a foreign court.¹¹ Furthermore, various treaties, such as the Vienna Convention on Diplomatic Relations,¹² the Vienna Convention on Consular Relations,¹³ the New York Convention on Special missions,¹⁴ and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,¹⁵ prohibit a head of state to invoke functional immunity as a defense. In addition, the Rome Statute,¹⁶ ICTY Statute,¹⁷ ICTR Statute,¹⁸ and other international tribunals' statutes¹⁹

⁸ Id.

⁹ Id.

¹⁰ Jasper Finke, Sovereign Immunity: Rule, Comity or Something Else?, 21 Eur. J Int'l L. 853, 858-63 (2010).

¹¹ Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3) [2000], 1 A.C. 147 (H.L) (appeal taken from Eng.) [hereinafter Pinochet case].

¹² Vienna convention on Diplomatic relations, April 18, 1961, 500 U.N.T.S. 95 (diplomatic immunity recognized without specific mention to head of state immunity).

¹³ Vienna Convention on Consular Relations art. 10, April 24, 1963, 596 U.N.T.S. 261 (consular immunity recognized without specific mention to head of state immunity).

¹⁴ Convention on Special Missions art. 21, December 8, 1969, 1400 U.N.T.S. 231 (head of state immunity recognized during a special mission in foreign states).

¹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (the convention does not recognize officials' immunities); see Andrea Bianchi, Immunity versus Human Right: The Pinochet Case, 10 Eur. J. Int'l L 237, 245(1999) (*Pinochet* court reasoned that head of state immunity is inconsistent with the purpose and object of the Torture Convention).

¹⁶ Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S.3 (Nov. 10, 1998) [hereinafter Rome Statute].

¹⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827(May 25, 1993) [hereinafter ICTY statute].

¹⁸ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Neighboring

make it clear that an incumbent position in office does not bar prosecution. Various domestic courts have also tried to indict state officials for international crimes.²⁰ These examples show the international community's trend to make the absolute head of state immunity into a restrictive one. However, the immunity still hinders a criminal prosecution of a head of state in a foreign state court. In many cases, heads of states are not prosecuted for international crimes because of its difficulty in bringing a case before international courts, thereby they escape criminal liability. Therefore, the international community has to resolve an issue of whether an exception to head of state immunity may exist in order to prosecute sitting heads to states.

Arguments have been made to create such an exception when a head of state commits international crimes. One argument states that since the official function of head of state does not include violation of *jus cogens* norm, he does not enjoy immunity.²¹ This argument suggests that such an exception exists because a head of state commits an international crime in his private capacity. Another argument, based on Pinochet case, states that a treaty obligation prevents a former head of state from enjoying functional immunity when he commits a core international crime while he is in office.²² This argument also implies that an international crime is categorized as a private conduct. However, at the same time, if an element of the offense requires an official function, such as in torture, the court may need to find his act as official in order to prosecute him. Others argue that since head of state immunity gives incentive to heads

States, between January 1, 1994 and December 31, 1994 art. 6, S.C. Res. 955, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR statute].

¹⁹ Statute of the Special Court of Sierra Leon art.6(2), S.C. Res. 1315, U.N. SCOR, 4054th mtg., U.N. Doc. S/RES/1270 (1999)[hereinafter Sierra Leon Special Court Statute]; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art 29, NS/RKM/1004/006 (Feb. 27, 2003) (amended on October 27, 2004) [hereinafter Extraordinary Chambers Law].

²⁰ See Antonia Casses, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 Eur. J. Int'l. L. 853, 870-71(2002) (state officials were indicted in foreign domestic courts in Israel, France, Italy, the Netherlands, Britain, US, Poland, Spain and Mexico).

²¹ Bianchi, supra note 15, at 262; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

²² Pinochet case, supra note 11 (international crimes cannot be committed under head of state's functional capacity).

of state to hold office as long as possible when they commit international crimes, such immunity should not exist.²³ In my opinion, all these arguments help to create an exception to absolute head of state immunity. However, none of the above arguments solves the issues of whether such an exception to immunity applies regardless of whether a head of state is incumbent or former, whether he commits an international crime in his official capacity or private capacity, or whether such a distinction is even desirable.

Under current customary international law, an incumbent head of state has absolute immunity regardless of whether his conduct falls under his private or official capacity. If an exception to head of state immunity exists because he violates *jus cogens* norms in his private capacity, a head of state still has functional immunity, which lasts as long as he holds the official status. Therefore, he can be prosecuted only when he leaves the office. On the other hand, if a head of state commits an international crime in his official capacity, his conduct is protected under official immunity. If a commission of an international crime revokes his functional immunity, the international community must categorize his act as official. This shows that such a distinction becomes essential when a domestic court deals with the issue of head of state immunity.

This paper will argue that we should not make any distinction between functional or personal immunity when a head of state commits international crimes because categorization often poses difficult and unsolvable questions. Part I will show that a distinction between functional and personal immunity is vague, and such a distinction allows a responsible head of state to avoid criminal liability, as well as the international trend in holding responsible heads of states accountable. Part II will argue that the ICJ decision in Congo v. Belgium does not correctly

²³ Michael A. Tunks, Diplomats or Defendants? Defining the Future of Head-of-State Immunity, 52 Duke L.J. 651, 656 (2002).

reflect the customary international law because various courts have recognized the exception to the absolute immunity when the issue involved one of the core international crimes committed by a head of state or state officials. Part III will argue that as a necessity, we need to use domestic courts to prosecute heads of state for international crimes because of its accessibility and responsiveness compared to international tribunals. Finally, Part IV will focus on the possible risks with removing head of state immunity.

I. Restrictive Immunity for Head of State Should Prevail Over Absolute Immunity Because the Distinction is Meaningless, and the Need for Accountability over Perpetrators of International Crimes is Clear

When a court tries to prosecute a head of state, an issue arises as to whether a head of state commits an international crime in his official capacity or personal capacity. The categorization is especially important under current international law because it affects how long he may evade prosecution for international crimes. However, depending on which immunity the court is willing to apply, a head of state can label his conduct as official or personal, and perpetually avoid criminal prosecution. This is contrary to the international trend in holding perpetrators of international crimes accountable. By denying this categorization requirement for international crimes, the international community will be able to prosecute heads of states because they can hide behind neither personal nor functional immunity.

A. Does a head of state commit a core international crime in his official capacity or personal capacity?

Since head of state immunity has two types of immunities, namely functional and personal immunity, the characterization of the act by a head of state becomes crucial in deciding whether a domestic court applies immunity for his criminal prosecution. As an internationally leading case, the ICJ determined in Congo v. Belgium that the incumbent state official has absolute

immunity even when a domestic court indicts him for a core international crime.²⁴ The ICJ stated categorization of his act as personal or functional does not affect his absolute immunity in foreign jurisdictions.²⁵

This decision triggered the issue of whether a head of state commits a core international crime in his official capacity or personal capacity.²⁶ Some scholars believe that a head of state acts in his private capacity when he commits a core international crime.²⁷ They argue that a head of state function does not include a violation of *jus cogens* norms because of its hierarchy in international law.²⁸ In addition, a head of state does not legitimately act on behalf of his state when he commits an international crime²⁹ because such an act does not further any of the state's legal objectives. On the other hand, others disagree to describe that a head of state commits international crimes in his private capacity.³⁰ They argue that if the head of state acts on behalf of the state regardless of its legality, it is an official act; therefore he has the absolute functional immunity.³¹ They specifically disagree to characterize international crimes as private because of its implication on state liability; if such an act is personal, the state evades a possible liability as a state for the international crime because legally it has no involvement in the head of state's commission of the crime.³²

Responding to a split in determining an international crime as private or official, scholars have tried to suggest ways to resolve the categorization. Some has considered a distinction

²⁴ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) [hereinafter Arrest Warrant case].

²⁵ *Id.* at ¶ 58.

²⁶ See Akande, *Immunities of State Officials*, *supra* note 4; Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 Eur. J. Int'l L. 877, 877(2002).

²⁷ Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?*, 13Eur. 895, 898 (2002).

²⁸ Bianchi, *supra* note 15, at 271.

²⁹ Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation*, 12 Eur. J. Int'l L. 595, 601 (2001).

³⁰ Wirth, *supra* note 26, at 877; Spinedi, *supra* note 27, at 897.

³¹ Spinedi, *supra* note 27, at 897-899.

³² *Id.*

between functional and personal ambiguous, so they advocated that the court should look to the purpose and means used to commit such an international crime to determine the type of his act.³³ Others suggested that because international crimes often include an element of official act, a head of state must act in his official capacity in order for a court to prosecute him.³⁴ However, they also argued that, as a categorical exception to functional immunity, a head of state should have no functional immunity when he commits an international crime even though it is classified as his official conduct.³⁵ Those suggested solutions would not solve the issue because the distinction creates a way for the head of state to evade prosecution regardless of which way the court decides. Therefore, we should not be compelled to classify international crime as private or official, but grant no immunity to heads of state for international crimes.

If the international community establishes factors to decide whether the international crime committed by a head of state falls under his private or official capacity, the head of state would only manipulate to label his acts as private or functional in order to avoid criminal prosecution eternally. On the other hand, establishing a categorical exception to functional immunity misunderstands the original meaning of functional immunity. By deciding that a head of state commits an international crime under his official capacity, the international community does not recognize his act as an individual act, but that of a state. It is illogical to prosecute a head of state for the act he did not commit as an individual, but rather as a state. Such a categorical exception confuses the distinction between personal and functional immunity. A sensible argument is that a head of state has no immunity for an international crime, not because the crime revokes his functional immunity, but because no distinction exists between private and official for international crimes. Therefore, the courts should not categorize whether a head of

³³ Akande, Immunities of State Officials, *supra* note 4, at 815-852; Casses, *supra* note 20, at 867-870.

³⁴ Akande, Immunities of State Officials, *supra* note 4, at 815-852.

³⁵ *Id.* at 839-49.

state acts in his private or official capacity, but remove the categorization of immunity, and deny any immunity when an incumbent head of state commits an international crime.

B. *Opinio juris* shows the states' responsibility to hold heads of state accountable, and functional immunity prevents domestic courts from prosecuting heads of state

The international community agrees that we should hold perpetrators of international crimes liable. As early as the Nuremberg tribunal, the international community has recognized accountability of a head of state for international crimes.³⁶ The UN General Assembly has also approved this proposition.³⁷ In Pinochet case, the House of Lords found that General Pinochet, who was the head of state of Chile at the time he committed torture, did not have immunity.³⁸ The House of Lords reasoned that because UK has ratified to the Torture Convention, it has to uphold the object and purpose of the treaty, which defines torture as an act committed by public officials.³⁹ Therefore, the Torture Convention obliges signatory states to punish the perpetrator of torture.⁴⁰ However, the House of Lords did not clearly indicate whether Pinochet committed torture within his official capacity or private capacity, but agreed that as a customary international law when an official commits an international crime, he does not have official immunity.⁴¹

This reasoning has flaws. By stating that official immunity doesn't attach with international crime, the House of Lords implies that a head of state commits international crimes

³⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 Charter art. 7 (Aug. 8, 1945), [available at](http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument) <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument> [hereinafter Nuremberg Charter]; Charter of the International Military Tribunal for the Far East art. 6 (April 29, 1946), [available at](http://droitcultures.revues.org/2183#quotation) <http://droitcultures.revues.org/2183#quotation> [hereinafter Tokyo tribunal statute].

³⁷ Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, U.N. Doc. A/236, at 1144 (1946) [hereinafter Affirmation by GA].

³⁸ Pinochet case, *supra* note 11.

³⁹ Id.

⁴⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S.85 [hereinafter Torture Convention].

⁴¹ Bianchi, *supra* note 15, at 249.

in his private capacity.⁴² However, one element of torture requires that an official commits the act of torture.⁴³ The definition suggests that an official involvement is required in order to establish a head of state committed torture.⁴⁴ Therefore, categorizing his act as private weakens the existence of torture as defined by the Torture Convention because Pinochet could argue that no official involvement occurred because his act was done under his personal capacity. As stated above, some argued that such a flaw impacts not only on the prosecution of heads of states but also on holding a state responsible for violation of international law because if the act is private, such an act does not implicate state responsibility.⁴⁵ In that scenario, both a head of state and his state evade international responsibility.

However, this argument is misleading because no correlation exists between the categorization of the act as personal or functional, and whether the state can be held liable. The ICJ recently decided that sovereign immunity applies to a domestic court even though the underlying offense arguably violated *jus cogens* norms in Germany v. Italy.⁴⁶ The victims of the WWII in Italy brought a civil suit against Germany for compensation for forced labor and other international crimes.⁴⁷ Germany claimed that it has foreign sovereign immunity, and no exception to state immunity exists for *jus cogens* norms violation.⁴⁸ The ICJ accepted Germany's claim because it found no customary international law, in which a state loses its sovereign immunity because the state violates *jus cogens* norms.⁴⁹ However, the Court added that the decision does not affect customary international law on head of state immunity as seen in

⁴² Pinochet case, *supra* note 11, at 897.

⁴³ Torture Convention, *supra* note 40.

⁴⁴ See also Wirth, *supra* note 26, at 891.

⁴⁵ Id.

⁴⁶ Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 1(Feb. 3).

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

Pinochet case.⁵⁰ This opinion shows that regardless of whether the responsible head of state has functional or personal immunity, under the current international law, such a categorization does not affect the fact that states are immune from civil liability in a foreign court. In other words, even if Pinochet has acted in his private capacity in committing torture, the victims of torture cannot sue Chile for damages in foreign courts. At the same time, decision on the state liability does not affect the head of state's responsibility for international crimes because state sovereign rules differ from head of state immunity rules.

Sovereign immunity developed different exceptions over years from head of state immunity.⁵¹ A state does not have criminal liability because it is not an individual, although some civil law states allow victims to bring a claim for damages in criminal proceedings.⁵² If a head of state commits an international crime by utilizing the state's army or taking advantage of his official status, the state should be held accountable for its action, if jurisdictional requirements are met. As a recent example, Yugoslavia (Serbia) was found liable in failing to prevent and punish genocide in accordance with the Genocide Convention,⁵³ while the ICTY indicted Yugoslav President Slobodan Milošević for crimes against humanity and war crimes arising from the same war.⁵⁴ The fact that the ICTY statute had to specifically deny official

⁵⁰ Id.

⁵¹ Joanne Foakes and Elizabeth Wilmshurst, State Immunity: the United Nations Convention and Its Effect, International Law Programme, Chatham House (May 2005), <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bpstateimmunity.pdf>; United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. GAOR, 59th Sess. Supp. No. 49, U.N.Doc. A/59/49 (Dec. 2, 2004) (not in effect yet).

⁵² Foakes, supra note 51, at ¶ 30.

⁵³ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595, ¶¶ 219-29 (July 11); Marko Milanović, State Responsibility for Genocide: A Follow-Up, 18 Eur. J. Int'l L. 669, 670 (2007); Mark Toufayan, The World Court's Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 40 Tex. Int'l L.J. 233, 249 (2005).

⁵⁴ Press Release, ICTY, President Milosevic and Four Other Senior Fry Officials Indicted for Murder, Persecution and Deportation in Kosovo, JL/PIU/403-E (May 27, 1999), available at <http://www.icty.org/sid/7765>.

immunity in criminal proceedings further suggests that the categorization of functional or personal immunity and the trend to hold the perpetrator accountable are in conflict.⁵⁵

In addition, categorizing international crimes as official or private act hinders the access to justice. Although the ICJ in Congo v. Belgium emphasized that immunity does not amount to impunity,⁵⁶ situations will exist where the immunity will mean impunity. In fact, if a domestic court may not prosecute a head of state because of his immunity, he will never be prosecuted unless the ICC has jurisdiction over the case, or the UN establishes an international tribunal to specifically prosecute him and other officials. As the House of Lords correctly decided in Pinochet case,⁵⁷ so long as the state is a signatory to a treaty which doesn't recognize immunity as a defense, the state has an obligation not to offend the object and purpose of the treaty.⁵⁸

When the treaty obliges state parties to prosecute or punish certain international crimes, they have to uphold such an obligation.⁵⁹ Although the ICJ cautioned that such treaties do not affect customary international law on immunity,⁶⁰ states have a duty to prosecute those who commit international crimes under the treaties to which they signed on. In fact, “approximately seventy international criminal conventions” impose such an obligation to party states, including “the Genocide Convention, the Convention against Torture, International Covenant on Civil and Political Rights, American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.”⁶¹

⁵⁵ See also Ellen L. Lutz & Caitlin Reiger, Prosecuting Heads of State, 15 (1st ed. Cambridge University Press 2009) (European countries, Latin America, Asia and African countries have held heads of state accountable for atrocities).

⁵⁶ Arrest Warrant case, supra note 24, at ¶ 48.

⁵⁷ Pinochet case, supra note 11 (“As required by the Torture Convention ‘all’ torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom”).

⁵⁸ Vienna Convention Law of Treaties art 18, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁹ Id.

⁶⁰ Arrest Warrant case, supra note 24, ¶59.

⁶¹ Masaya Uchino, Prosecuting Heads of State: Evolving Questions of Venue - Where, How, and Why?, 34 Hastings Int'l & Comp. L. Rev. 341, 344 (2011); Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2562- 2582 (1991).

The need for accountability is clear, and it is the *opinio juris* that those who are responsible for committing international crime should be prosecuted. For example, if lower ranking officials without recognized functional or personal immunity acts in accordance with the order by the head of state, he will be prosecuted regardless of whether he has an official title or not. However, by categorizing such acts as functional, the head of state can never be prosecuted unless some exceptions apply. This shows that such a categorization does not contribute in holding responsible heads of state accountable for international crimes.

The International Law Commission (ILC), for the first time in 2007, decided to address the issues concerning state officials.⁶² In the third resolution, the ILC acknowledged that contradiction exists between human rights and immunities.⁶³ While the ILC seems to take the position to accord absolute incumbent head of state immunity, it recognizes that other states may provide access to justice, which would necessarily include prosecution of a head of state, if he is responsible for the international crime.⁶⁴ The ILC also recognizes that a state has responsibility not to let immunity be an obstacle for victims to have an access to justice.⁶⁵ If the goal of the international community is to hold heads of states responsible for international crime, this categorization becomes a barrier. Therefore, the international community should not try to categorize the acts of the head of state when it is core international crime whether it is personal or functional.

II. The ICJ case, Congo v. Belgium, Did Not Correctly Reflect the Customary International Law by Denying Any Existence of Exceptions to Absolute Immunity for Incumbent Head of State

⁶² Immunity of State officials from foreign criminal jurisdiction, G.A. Res. 62/66, Sixty sixth Sess., Supp. No. 10, U.N. Doc. A/66/10 (5 May to 6 June and 7 July to 8 August 2008) (final resolution is still in progress).

⁶³ Zdzislaw Galicki, Special Rapporteur, Third report on the obligation to extradite or prosecute, G.A. Res. 60, Sixtieth Sess., U.N. Doc. A/CN.4/603 (May to 6 June and 7 July to 8 August 2008).

⁶⁴ Annyssa Bellal, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes, 9 J. Int'l Crim. Just. 227, 231 (2011); Immunity of State officials from foreign criminal jurisdiction, supra note 62.

⁶⁵ Bellal, supra note 64, at 235.

In 2000, Belgium issued an arrest warrant against Yerodia, who at the time was an incumbent state official, for grave breach of the Geneva Conventions and the additional protocols, and crimes against humanity.⁶⁶ Congo claimed that Belgium violated international law by failing to refuse to prosecute an incumbent state official, and brought a claim against Belgium in ICJ.⁶⁷ Belgium claimed that state officials do not have immunity when the crimes in issue constitute war crimes or crimes against humanity.⁶⁸ The ICJ rejected Belgium's claim and found that Belgium violated international law because no customary international can be deduced to deny incumbent state official's immunity,⁶⁹ although various cases below suggest the existence of such an exception.

The ICJ erroneously determined that exceptions to immunity applied by the international tribunals do not affect the status of customary international law on domestic courts.⁷⁰ As mentioned above, various treaties waive head of state immunity for international crimes. The Nuremberg statute⁷¹ and the Tokyo tribunal statutes⁷² do not acknowledge official status as a bar to prosecute the perpetrators. As the Nuremberg and Tokyo tribunals are often cited as one of the first international tribunals to prosecute international crimes,⁷³ the statutes have significance in developing customary international law on the issue of immunity.

Even if not much state practice exists in removing the immunity of the sitting head of state, the UN General Assembly has confirmed the existence of *opinio juris* by confirming the proposition made by the Nuremberg Charter, which recognized accountability for international

⁶⁶ Arrest Warrant case, *supra* note 24, at 123.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*, at 145.

⁷⁰ *Id.*, at ¶59.

⁷¹ Nuremberg Charter, *supra* note 36.

⁷² Tokyo tribunal statute, *supra* note 36.

⁷³ Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement*, 29-30 (2nd ed. Thompson Reuters, 2010).

crimes committed by state officials.⁷⁴ The fact that various statutes of international tribunals repeatedly include such language reinforces that the international community as a whole has accepted this notion of removing incumbent head of state immunity for atrocities.⁷⁵ As the ICJ statute considers the conventions and judicial decisions as the source of international law,⁷⁶ these above mentioned statutes should be regarded as an emerging trend in international law to remove head of state immunity for international crimes.

Various practices by international courts further affirm this emerging international law. Special Court for Sierra Leon indicted Charles Taylor, the sitting head of state of Liberia, for an international crime he allegedly committed during the Sierra Leon Civil War.⁷⁷ The Special Court for Sierra Leon rejected Taylor's defense on absolute immunity from criminal liability.⁷⁸ The Court relied on the fact that the Special Court for Sierra Leon is regarded as international court because it is backed by the UN, and the Security Council was involved in establishing the tribunal.⁷⁹ Therefore, Congo v. Belgium didn't control this case since the ICJ case does not stand for the proposition that international tribunals may not remove incumbent head of state's absolute immunity.⁸⁰ Furthermore, the ICC has issued arrest warrants against Al-Bashir, President of Sudan, for crimes against humanity and genocide.⁸¹ Article 27 of the Rome statute specifically denies immunity as a defense.⁸² Although all of the above statutes and cases involve

⁷⁴ Affirmation by GA, supra note 37.

⁷⁵ Rome Statute, supra note 16; ICTY statute, supra note 17, ICTR statute, supra note 18, Sierra Leon Special Court Statute, supra note 19.

⁷⁶ Rome Statute, supra note 16, art. 38 (a), (d).

⁷⁷ C. Jalloh, Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone, ASIL Insights, American Society of International Law (October 2004), http://www.asil.org/insigh145.cfm#_ednref22.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrants of Arrest (March 4, 2009, July 12, 2010).

⁸² Rome statute, supra note 16, art. 27.

international tribunals, these practices are the evidence that the international community should hold a head of state accountable for international crimes.

In fact, although without success, in 2001, the French court tried to use its domestic court to prosecute a head of state; the court indicted Qaddafi, who at the time was arguably the Head of State of Libya, for the bombing of the UTA ariliner.⁸³ The victims of the bombing and an NGO made a complaint to indict Qaddafi to the Chambers Court, as allowed under the French system.⁸⁴ The Court eventually granted immunity to Qaddafi and dismissed the indictment because it did not regard terrorism as an international crime.⁸⁵ This reasoning suggests that the Court might have applied an exception to the head of state immunity if the underlying crime constituted one of the core international crimes as stated in the ICC statute.⁸⁶ Therefore, although not much state practice exists, enough evidence shows that a head of state should not be able to claim immunity when prosecuted for core international crimes, such as genocide, crimes against humanity and war crimes.

III. Domestic Courts Provide the Best Platforms for Victims to Seek Access to Justice in Prosecuting a Head of State, Rather Than International Tribunals

Difficulties exist in bringing cases before the international tribunals, such as the ICC. One of the problems is that prosecution starts only well after the commission of the international crime.⁸⁷ In contrary, domestic courts have the ability to respond to human rights crisis more quickly because they do not need any UN involvement in establish a new international tribunal, such as ICTY and ICTR. In addition, the procedural and jurisdictional requirements under the

⁸³ Zappala, *supra* note 29, at 595.

⁸⁴ *Id.*, at 596.

⁸⁵ *Id.*

⁸⁶ Rome Statute, *supra* note 16.

⁸⁷ ICTY Statute, *supra* note 17; ICTR statute, *supra* note 18, Sierra Leon Special Court Statute, *supra* note 19, Extraordinary Chambers Law, *supra* note 19.

international tribunals make it difficult for the victims to have an access to justice, and thereby making domestic courts a more attractive option to seek justice.

A. The domestic courts respond to hold crimes accountable more quickly than international tribunals

The ICC issued an arrest warrant against Al-Bashir, President of Sudan, in 2009 and in 2010, even though the alleged crime was committed in 2003.⁸⁸ Similarly, it took five years for the ICC to issue an arrest warrant against Jean-Pierre Bemba Gombo, President and Commander in Chief of the Mouvement de liberation du Congo (MLC) for war crimes and crimes against humanity committed from 2002 to 2003 in Central African Republic.⁸⁹ Furthermore, the ICC issued an arrest warrant against Abdel Raheem Muhammad Hussein, current Minister of National Defence in Sudan in 2012 for crimes allegedly committed from 2002 to 2003.⁹⁰ Although the ICC was responsive in issuing arrest warrants against Saif Al-Islam Gaddafi, de Facto Libyan Prime Minister, and Abdullah Al-Senussi, Colonel in the Libyan Armed Forces and current head of the Military Intelligence for crimes allegedly committed in 2010,⁹¹ generally the ICC does not promptly hold perpetrators accountable for international crimes. In comparison, in 2000 Belgium issued an indictment of Yerodia, at the time sitting Minister for Foreign Affairs

⁸⁸ ICC Issues Arrest Warrant for Sudanese President for War Crimes in Darfur, UN News Center (March 4, 2009) <http://www.un.org/apps/news/story.asp?NewsID=30081&Cr=darfur&Cr1=icc>.

⁸⁹ Press Release, ICC, Jean-Pierre Bemba Gombo Arrested for Crimes Allegedly Committed in the Central African Republic, ICC-CPI-20080524-PR315(May 24, 2008), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/press%20releases/jean_pierre%20bemba%20gombo%20arrested%20for%20crimes%20allegedly%20committed%20in%20the%20central%20african%20republic?lan=en-GB; Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05/08, Warrant of Arrest (May 23, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc535163.pdf>.

⁹⁰ Prosecutor v. Abdel Raheem Muhammad Hussein, Case No. ICC-02/05-01/12, Warrant of Arrest (May 1, 2012), available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050112/icc02050112?lan=en-GB>.

⁹¹ Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Warrants of Arrest (June 27, 2011), available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/ICC0111/Related+Cases/ICC01110111/ICC01110111.htm>.

of Congo, for his involvement in publicly encouraging the Congolese to kill Tutsis in 1998.⁹²

Although not many state courts have prosecuted heads of states, considering the slowness of the ICC's procedure in issuing arrest warrants against state officials for international crimes, we have a necessity in utilizing domestic courts in order to prosecute responsible heads of states.

Even with the development of international tribunals, domestic courts have an important role in prosecuting international crimes.⁹³ For example, when Belgium enacted universal jurisdiction statute, which allowed "victims to file complaints... for atrocities committed abroad,"⁹⁴ victims filed various complaints against heads of states.⁹⁵ In addition, a state court, although his own state, prosecuted Alberto Fujimori, former Peruvian President for atrocities he committed during his incumbency.⁹⁶ These examples show that domestic courts are equipped with prosecuting heads of state, although this does not reject the existence of international tribunals. International courts are suitable platforms to prosecute heads of states or other state officials because risks with prosecuting a head of state in domestic courts, mentioned below in Part IV, are minimized. Also, the judges serving for the international tribunals include those who have expertise in international law. Therefore, they apply the international law more appropriately than judges in domestic courts do. Nevertheless, we should use domestic courts

⁹² Michael C. Dorf, Can One Nation Arrest the Foreign Minister of Another? The World Court Says No, FindLaw's Legal Commentary, Findlaw (Feb. 20, 2002), <http://writ.findlaw.com/dorf/20020220.html>; Amanda Nelson, Democratic Republic of Congo v. Belgium: The International Court's Consideration of Immunity of Foreign Ministers from Criminal Prosecution in Foreign States, 19 N.Y.L. Sch. J. Hum. Rts. 859, 861 (2003).

⁹³ Uchino, *supra*, note 61, at 353.

⁹⁴ Belgium: Universal Jurisdiction Law Repealed, Human Rights Watch (August 2, 2003), <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed> (now the statute requires some connection with Belgium, such as nationality).

⁹⁵ Uchino, *supra*, note 61, at 385 n.8 (citing Ellen L. Lutz & Caitlin Reiger, Introduction to Prosecuting Heads of State 3)(complaints were made against "Mauritanian President Maaouya Ould Sid'Ahmed Taya, Iraqi President Saddam Hussein, Israeli Prime Minister Ariel Sharon, Ivory Coast President Laurent Gbagbo, Rwandan President Paul Kagame, Cuban President Fidel Castro, Central African Republic Ange-Felix Patasse, Republic of Congo President Denis Sassou Nguesso, Palestinian Authority President Yasir Arafat, former Chadian President Hissene Habre, former Chilean President General Augusto Pinochet, and former Iranian President Ali Akbar Hashemi-Rafsanjani").

⁹⁶ Jo-Marie Burt, Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations, 3 Int'l J. Transitional Just. 384, 396- 97 (2009).

more often to prosecute heads of states, as Lord Millet in Pinochet case predicts,⁹⁷ because of accessibility and responsiveness.

B. International tribunals' underlying requirements to bring cases make the domestic courts more attractive because of its simpler structure

In order for the ICC to have jurisdiction, the states must be parties to the Rome Statute.⁹⁸ As of now, about 60% of the UN member states are state parties to the Rome Statute.⁹⁹ However, many states including the U.S., India, and China are not parties to the Rome Statute yet.¹⁰⁰ Therefore, the ICC has geographically limited jurisdictions as well as other limitations. The ICC obtains jurisdiction over cases when states are unwilling or unable to prosecute the perpetrator of international crimes.¹⁰¹ The UN Security Council may also refer cases under its Chapter VII power.¹⁰² However, the requirement of complementarity suggests that the ICC defers to the criminal proceedings in the domestic courts.¹⁰³ In addition, ad hoc international tribunals, such as ICTY and ICTR, are criticized as costly and time consuming because of its “cumbersome bureaucratic structure.”¹⁰⁴ Furthermore, in establishing such an ad hoc tribunal, if conducted through the Security Council’s Chapter VII power, political issues will be deeply involved because of the permanent members’ veto powers.¹⁰⁵

⁹⁷ Bianchi, supra note 15, at 249.

⁹⁸ Rome Statute, supra note 16; Jurisdiction and Admissibility, ICC at a glance, ICC, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> (last visited April 24, 2012) (jurisdiction of the ICC exists if “the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime”).

⁹⁹ Member States of the United Nations, <http://www.un.org/en/members/> (last visited April 24, 2012)(192 UN member states); The State Parties to Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited April 24, 2012) (120 states signatory to the Rome statute).

¹⁰⁰ The State Parties to Rome Statute, supra note 99.

¹⁰¹ Rome statute, supra note 16, art. 17.

¹⁰² Rome Statute, supra note 16, art. 13

¹⁰³ Id.; Lijun Yang, On the Principle of Complementarity in the Rome Statute of the International Criminal Court, 4 *China J. Intl'l L.* 121, 121-132 (June 2005), available at <http://chinesejil.oxfordjournals.org/content/4/1/121.full>.

¹⁰⁴ Ralph Zacklin, The Failings of Ad Hoc International Tribunals, 2 *J. Int'l Crim. Just.* 541, 542 (2004).

¹⁰⁵ UN Charter, Ch. VII.

All the requirements with the ICC jurisdiction as well as difficulty in establishing ad hoc tribunals necessitates the international community to rely on domestic courts in order to prosecute responsible heads of states for international crimes. Therefore, in prosecuting heads of states for international crimes, the international community should not use only the international tribunals, but utilize state courts because they have the ability to respond to cases more quickly and have simpler jurisdictional requirements than the international tribunals.

IV. Possible Risks in Removing the Distinction between Functional and Personal Immunity for International Crimes, thereby Making It Possible to Prosecute the Incumbent Head of State

Applying restrictive head of state immunity leads to several possible downsides. Risks include undermining the status of the state within the international community, as well as a powerful state's improper influence on the other state's political system or independence. In contrast, international tribunals, including hybrid tribunals, arguably do not impose such risks because of their status as international courts. However, observing the examples of hybrid tribunals, domestic courts will also work as a platform to prosecute heads of states. Furthermore, the issue of political influence is not foreign to the international tribunals. Moreover, above listed risks also exist in other areas of international law. A comparison with the development of humanitarian law will confirm that removing head of state immunity facilitate further progress in holding responsible individuals accountable for international crimes, and promote justice in the international community.

A. Equality among states; comparison between state courts and hybrid tribunals

Because of his unique position as a head of state, removing his immunity may interfere with sovereignty. As the concept of state sovereign immunity underlies head of state immunity,

a head of state could not have been distinguished from the state in the old customary international law.¹⁰⁶ Judge de Cara in Congo v. France opined in her dissenting opinion that since a head of state in Africa specifically represents “ethnic solidarity,” removing his immunity would affect his presence in the international community.¹⁰⁷ In addition, she stated that even if head of state immunity can be removed, he would merely avoid going to other states, including his enemy state, in order not to be arrested, so that such removal of immunity would hinder states to have peace talks.¹⁰⁸ Therefore, an effort to prosecute a head of state in a state court would only degrade the status of himself and his state in the international community, without actually holding him accountable. On the contrary, since the international tribunals are established by the UN or a treaty between a hosting state and the UN, the prosecution of a head of state in the international tribunals would not degrade the state’s status in the international community. In other words, prosecuting a head of state in international tribunals does not offend the notion of equality between states, since no state subjects another state to its law.

Following this argument, hybrid tribunals also should not offend such a notion of equality among states since they are international tribunals. However, not all the “international tribunals,” including the Special Court for Sierra Leon, are purely international in its nature. Although the Special Court for Sierra Leon decided that it is an international tribunal, it was not specifically

¹⁰⁶ Jerrold L. Mallory, Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings, 86 Colum. L. Rev. 169, 170 (1986).

¹⁰⁷ Certain Criminal Proceedings in France (Republic of the Congo v. France), 2003 I.C.J. 102, 116 (June 17, 2003)(dissenting opinion, J. de Cara) (France issued a warrant against the President of the Republic of the Congo, H.E. Mr. Denis Sassou Nguesso, and other state officials for crimes against humanity and torture. Congo brought a case in the ICJ complaining that such an arrest warrant offends “the principle of sovereign equality among all Members of the United Nations” for provisional measures. The ICJ did not find that such provisional measures are necessary at this point.); Press Release, ICJ, Certain Criminal Proceedings in France (Republic of the Congo v. France), Case Removed from the Court’s List at the Request of the Republic of the Congo, I.C.J. Press Release 2010/36 (November 17, 2010) (Congo later requested the case be removed from the Court’s list), available at <http://www.icj-cij.org/docket/files/129/16233.pdf>.

¹⁰⁸ Press Release 2010/36, supra note 107.

established by the Security Council's Chapter VII power.¹⁰⁹ Notably, its statutes do not specify that only the head of state of the hosting state can be prosecuted, but deny all head of state immunity as a bar to a prosecution.¹¹⁰

In fact, the Special Court for Sierra Leon indicted Charles Taylor, incumbent President of Liberia.¹¹¹ If Sierra Leon's domestic court is competent, it should be able to prosecute Charles Taylor as well without having to grant him immunity. However, a state court would have to grant immunity following the ICJ decision in Congo v. Belgium.¹¹² It is irrational to require Sierra Leon's domestic court to grant Charles Taylor immunity, but not with the Special Court for Sierra Leon, when the Special Court for Sierra Leon was created specifically to prosecute those who are responsible for the international crimes committed during its civil war, which affected Sierra Leon, and not the whole international community. Merely because the UN involved in establishing the ad hoc tribunal, the nature of the offenses committed by Charles Taylor does not change. Regardless of the UN involvement, when the international crimes committed by a head of state affects another state, at least the affected state should be able to prosecute him without granting immunity.

In addition, it is not rare for a head of state to be involved in international crimes committed in another state. For example, Jean-Pierre Bemba Gombo, President of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC), allegedly committed crimes against humanity and war crimes in Central African Republic during 2002 to 2003.¹¹³ If the UN established a hybrid tribunal in Central African Republic in order to prosecute those who

¹⁰⁹ Id.

¹¹⁰ Sierra Leon Court Special Statute, supra note 19; Extraordinary Chambers Law, supra note 19, art. 15; Law of The Iraqi Higher Criminal Court, http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (last visited April 24, 2012).

¹¹¹ Jalloh, supra note 77.

¹¹² Arrest Warrant case, supra not 24.

¹¹³ ICC-CPI-20080524-PR315, supra note 89.

committed the international crimes during the time, it would have jurisdiction over Jean-Pierre Bemba Gombo, even though he is a national of the Democratic Republic of Congo, and President of MLC. Such a criminal proceeding would arguably degrade the status of Congo or MLC, according to the argument made by Judge de Cara in Congo v. France. However, if the statute of such a hybrid tribunal does not recognize his official status as a defense, the ad hoc court will be able to prosecute him.

Although a domestic court is fundamentally different from hybrid tribunals because the international community has no direct involvement in establishing each state's judicial system, the international community cannot only rely on hybrid courts as mentioned in Part III. Hybrid courts often has jurisdiction over only specific individuals and incidents. In addition, establishing hybrid tribunals is extremely costly.¹¹⁴ At the same time, a hybrid court often incorporates domestic law,¹¹⁵ and includes domestic judges,¹¹⁶ therefore has similarities to domestic courts. If a hybrid tribunal may prosecute heads of states different from a hosting state, a domestic court, if equipped to apply international law and has jurisdiction over the case, should be able to prosecute them also.

Furthermore, the prosecution does not necessarily deny equality among states unless the prosecuting state tries to apply its domestic law extraterritorially. Although this paper will not discuss the controversy over universal jurisdiction, the concept of universal jurisdiction supports removing head of state immunity. Universal jurisdiction stems from the idea that certain atrocities are so egregious that they affect the whole international community.¹¹⁷ By utilizing universal jurisdiction, each state may hold those who committed international crimes

¹¹⁴ Van Schaack, supra note 73, at 169.

¹¹⁵ Id., at 161.

¹¹⁶ Id., at 167.

¹¹⁷ Universal Jurisdiction: Questions and answers, Amnesty International, <http://www.amnesty.org/en/library/asset/IOR53/020/2001/en/009a145b-d8b9-11dd-ad8c-f3d4445c118e/ior530202001en.pdf> (last visited April 22, 2012).

accountable.¹¹⁸ Under the universal jurisdiction, each state has equal power to prosecute those who committed *jus cogens* norms violation. Therefore, a prosecuting state does not subdue the state to which the prosecuted head of state belongs, but merely exercises what is allowed under the international law. As long as the concept of universal jurisdiction exists, domestic courts should be able to utilize it when the head of state committed atrocities.¹¹⁹

B. Political influence exists in prosecution by both domestic and international tribunals, therefore this risk should not prevent a domestic court from prosecuting a head of state

Political influence is probably one of the biggest problems with the prosecuting state officials including a head of state in a domestic court. Because of such political influence, a prosecuting state may hesitate to remove head of state immunity, or a prosecuting state may manipulate another state's political system, judicial system or economy. For example, when Iraqi citizens filed criminal complaints against George H.W. Bush, former U.S. President, Dick Cheney, former U.S. vice president, and other officials, in the Belgium court for international crimes, the US warned Belgium that they would “pull NATO headquarters out of Brussels unless the law was changed.”¹²⁰ Responding to the threat, Belgium amended the universal jurisdiction law to more restrictive law with some procedural requirements, so that they could not prosecute heads of states that easily anymore.¹²¹ On the other hand, a prosecution against Hissene Habré,

¹¹⁸ Id.

¹¹⁹ Cedric Ryngaert, Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan cases, 2007 Hague Justice J.14 (2007) (Netherlands universal jurisdiction statute); Alien Tort Statute, 28 U.S.C.A. § 1350 (West 1948).

¹²⁰ Lutz, Prosecuting Heads of State, *supra* note 55, at 37.

¹²¹ Belgium: Universal Jurisdiction Law Repealed, August 2, 2003, <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

former head of state of Chad, in the Belgium Court still continues.¹²² It is not to suggest that Belgium is improperly influencing Chad's governmental or political system, but as a possibility, Belgium may trade revocation of an arrest warrant for something in return, thereby exploit Chad's resources or adjusts its political structure to Belgium's advantage. Although this issue has broader implication than removal of head of state immunity, international community may disagree with removing head of state immunity because of the political influence issues.

However, such political influence happens in international courts as well. Because of the limited jurisdiction of the ICC, heads of politically powerful states will probably not be prosecuted. Besides the fact that several of the permanent members in the Security Council have not been state parties to the Rome statute,¹²³ the Security Council will not refer a case to the ICC if the case involves their states. Similarly, the Security Council will not establish an ad hoc tribunal if the international crimes were committed by their heads of states, as shown with the US example above. In that case, domestic courts will be the only alternative jurisdiction to prosecute responsible heads of state, if the prosecuting state can resist such political influence. Therefore, political influence should not hinder utilizing domestic courts to prosecute heads of state.

C. Comparison with Humanitarian Intervention

The core idea of removing head of state immunity and humanitarian intervention overlaps because both provide a possible solution in preventing atrocities in the international community. With removing head of state immunity, the international community may indirectly intervene in a humanitarian crisis in another state because, if a head of state plans or orders such atrocities

¹²² Lutz , Prosecuting Heads of State, *supra* note 55, at. 37 (the prosecution continued because of loopholes in the new Belgium law restricting universal jurisdiction, such as Belgium citizen as the plaintiff, as well as that Chad waived his immunity); see Belgium/Senegal: World Court to Hear Habré Trial Dispute, <http://www.hrw.org/habre-case>, Human Rights Watch(last visited April 21, 2012) (case before the ICJ regarding to whether Senegal should prosecute or extradite Habre is pending).

¹²³ The States Parties to the Rome Statute, *supra* note 99.

within his state, the source of the atrocities may be physically removed from the state because of the arrest and prosecution.

Comparatively, although the same risks of sovereignty and political influence exist in humanitarian intervention, “a responsibility to protect (R2P)” has been recognized as part of the international law.¹²⁴ Similarly, a state may use humanitarian intervention as a pretext to engage in a war or to change the political regime of a particular state,¹²⁵ but the responsibility to protect in humanitarian intervention context imposes each state the responsibility over its citizens.¹²⁶ When the state fails to uphold its responsibility, the international community may intervene.¹²⁷ The risk does not justify invalidating grounds for humanitarian intervention because the international trend is to prevent international crimes.¹²⁸ Similarly, as the ICJ acknowledged that a state may prosecute its own head of state,¹²⁹ when the state fails to do so, the international community should step in to prosecute him. Necessity is suggested as one of the justifications of humanitarian intervention.¹³⁰ If the government of the head of state is not willing to prosecute

¹²⁴ International Commission on Intervention and State Sovereignty: Responsibility to Protect Report, Council on Foreign Relations (December 2001), <http://www.cfr.org/international-peace-and-security/international-commission-intervention-state-sovereignty-responsibility-protect-report/p24228>; Van Schaack, supra note 73, at 372; Jayshree Bajoria, The Dilemma of Humanitarian Intervention, Council on Foreign Relations (March 24, 201), <http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524#p2>.

¹²⁵ Van Schaack, supra note 73, at 37.

¹²⁶ Zack Beauchamp, Syria’s Crisis and the Future of R2P, The Middle East Channel (March 16, 2012, 2:15PM), http://mideast.foreignpolicy.com/posts/2012/03/16/syrias_crisis_and_the_future_of_r2p.

¹²⁷ Bajoria, supra note 124.

¹²⁸ Id. (the report also emphasizes “responsibility to prevent” and “responsibility to rebuilt”).

¹²⁹ Arrest Warrant case, supra note 24.

¹³⁰ Douglas Guilfoyle, Humanitarian intervention: neither right, nor responsibility, but necessity?, EJIL: Talk! (May 5, 2009), <http://www.ejiltalk.org/humanitarian-intervention-neither-right-nor-responsibility-but-necessity/>; Responsibility of State for Internationally Wrongful Acts art 25, 2001 Y.B. on ILC 7, U.N. Doc. G.A. Res. 56/83, corrected by A/56/49(I)/Corr.4., available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

him, and international tribunals do not have jurisdiction, the victims of such atrocities should be able to rely on other foreign courts since their rights to access to justice should be absolute.¹³¹

Furthermore, states have another option of humanitarian intervention without force if head of state immunity is removed. Since the state would not need the Security Council authorization or later approval for use of force,¹³² states will be less hesitant in intervening to the crisis by a means of criminal prosecution. As shown in Kosovo and Rwanda, the international community has continuously failed to intervene when a state needs the international community's help.¹³³ As evidenced by the current situation in Syria, the UN Security Council can be paralyzed even when the international community recognizes the existence of human rights violation.¹³⁴ Since the UN has already vocalized its concern over Syrian government authority's involvement in crimes against humanity in Syria, if a foreign state could indict those state officials without hindrance of immunity, a possibility exists in stopping such international crimes at an early stage.¹³⁵ Therefore, although risks in removing head of state immunity exist, considering the international trend in holding responsible heads of state accountable, such risks should not justify them to continue having the immunity.

Conclusion

¹³¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, GAOR, 64th Sess. U.N. Doc. A/60/147 (December 16, 2005), [available at](http://www2.ohchr.org/english/law/remedy.htm) <http://www2.ohchr.org/english/law/remedy.htm> (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005).

¹³² UN Charter Ch. VII.

¹³³ Julie Mertus, [Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo](#), 41 Wm & Mary. Rev. 1743 (2000); Michael J. O'Donnell, [Genocide, The United Nations, and the Death of Absolute Rights](#), http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bctwj/23_2/07_TXT.htm (2002).

¹³⁴ Paul Wood, [Russia and China veto resolution on Syria at UN](#), BBC News (February 4, 2012), <http://www.bbc.co.uk/news/world-16890107>.

¹³⁵ Alan Cowell & Steven Lee Myers, [U.N. Panel Accuses Syrian Government of Crimes Against Humanity](#), N.Y. Times (February 23, 2012), <http://www.nytimes.com/2012/02/24/world/middleeast/un-panel-accuses-syria-of-crimes-against-humanity.html?pagewanted=all>.

The international community has recognized head of state immunity as absolute for a very long time since the origin of such immunity. However, with the development of international crimes, the community also has developed *opinio juris* in holding perpetrators accountable. The international tribunals have, in fact, have prosecuted a number of heads of state by denying their immunity. Although immunity should not mean impunity, heads of states still practically enjoy impunity because of the notion of functional and personal immunity. This requirement of categorizing international crime committed by a head of state as private or functional allows him to possibly evade criminal prosecution forever. Since this categorization is vague, and does not promote bringing justice to the international community, we should eliminate this categorization requirement when a head of state commits an international crime.

Since, often times, the international tribunals are not responsive in prosecuting responsible heads of states for international crimes because of its procedural and jurisdictional requirements, as a necessity, we need to utilize domestic courts to prosecute heads of states. Looking at the prosecution of heads of states and other officials in hybrid tribunals, which had similarities with domestic courts, the international community should trust domestic courts' ability in handling the same cases. Although removing head of state immunity does bring risks of degrading the state's status and political influence, we should prosecute heads of states in domestic courts, and further develop the trend of holding perpetrators of international crimes accountable. We can achieve this goal by not categorizing a head of state's act as private or functional, and remove all immunity when he commits an international crime.