HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

A Thesis Submitted to the University of Khartoum in Partial
Fulfillment of the Requirements for the LL.M. Degree

By

MAWADA SIDDIG YOUSIF ABU-AGLA

LL.B. University of Khartoum 2007

Supervisor

Professor AKOLDA MAN TIER

Faculty of Law - Department of International and Comparative Law

March 2010
DECLARATION

This thesis is the result of my own work and it has not been submitted for another degree in this or another University.

Mawada Siddig Yousif Abu-Aгла
CHAPTER ONE

JURISPRUDENTIAL RATIONALE OF HEAD OF STATE IMMUNITY AND STATE IMMUNITY IN GENERAL

1. Introduction ........................................................................................................... 1

2. Head of State Immunity
   (i) The Evolution of Head of State Immunity .................................................. 1
   (ii) Distinction between Current and Former Head of State ....................... 4
   (iii) The Scope of Head of State Immunity in the United States ............... 7

3. The Rationale of State Immunity
   (i) Historical Background on State Immunity ............................................. 9
(ii) Sources of State Immunity: A Comparison between Common Law and Civil Law

4. Individual Responsibility as an Exception to Head of State Immunity

5. Functional Immunity (Ratione Materiae)

6. Personal Immunity (Ratione Personae)

7. Command Responsibility of the Head of State

8. International Human Rights versus Immunity

1. Theories that Lift State Immunity for Human Rights Violations

(i) The Normative Hierarchy Theory
(a) The American Approach.............................................................36
(b) The European Approach.............................................................38
(ii) The Theory of Collective Benefits.............................................39

9. Universal Jurisdiction versus Immunity.........................................41

10. Conclusion..................................................................................44

CHAPTER TWO

ADJUDICATION

1. Introduction..................................................................................46

2. Suleiman Al-Adsani v Government of Kuwait and Others Court of Appeal (Civil Division) (1996)..............................................................46

3. Pinochet Case..............................................................................52


5. Jones (Respondent) v. Ministry of Interior Al -Mamlaka Al –Arabiya ASSaudiya (the Kingdom of Saudi Arabia) (Appellants)

- Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)

-Jones (Appellant) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) [2006]..........................................................60

6. Discussion of the Cases...............................................................63
7. Conclusion........................................................................................................66

CHAPTER THREE
INTERNATIONAL CRIMINAL TRIBUNALS

1. Introduction........................................................................................................67

2. The Development of the Prosecution of International Crimes........67

3. The International Military Tribunal at Nuremburg and the Far East
   (i) Introduction..................................................................................................69
   (ii) The International Military Tribunal at Nuremburg...............................69
   (a) The Counts and Charges...........................................................................70
   (ii) The International Military Tribunal for the Far East (IMTFE)............72
   (a) Jurisdiction of the IMTFE........................................................................73

4. The Ad Hoc Tribunals: The International Criminal Tribunal for Former
   Yugoslavia (ICTY) and The International Criminal Tribunals for Rwanda
   (ICTR).............................................................................................................76
   (i) The International Criminal Tribunal for Former Yugoslavia (ICTY)......76
   (ii) The International Criminal Tribunals for Rwanda (ICTR).................79
   (a) Jurisdiction...............................................................................................81

5. The International Criminal Court (ICC)......................................................81
   (i) Introduction...............................................................................................81
(ii) Drafting of the ICC Statute.................................................................82

(iii) Crimes within the Jurisdiction of the Court........................................84

(iv) Exercise of Jurisdiction.......................................................................84

(v) Issues of Admissibility........................................................................85

(vi) Co-operation by States not Party to Rome Statute..............................86

(vii) The Scope of Head of State Immunity According to the Rome Statute... 87

6. Conclusion..............................................................................................90

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS.............................................92

BIBLIOGRAPHY........................................................................................97

A. BOOKS..............................................................................................97

B. ARTICLES.........................................................................................99

C. ELECTRONIC DATA..............................................................................101
DEDICATION

I would like to dedicate this research to my parents who gave me life; to my siblings, without their love and support I would not be the person I am; and to the new addition in my family, my beautiful niece Yasmine.

To all the victims of war, may our world take a lesson from your book and eliminate impunity.
ACKNOWLEDGMENTS

First and foremost I would like to thank God, without him nothing is possible. I am truly grateful and honored for having Professor Akolda M. Tier as my supervisor. It was because of his patience and guidance that this research has seen the light.

I would also like to thank Dr. Mohamed Elfatih Hamid and Dr. Ali Sulieman Fadlalla for providing me with references and for all their support and understanding during the stages of this research.

Words cannot express my deepest gratitude for my family, who were not only interested in the subject of my research but also for believing in me and for supporting me unconditionally against all odds and hardships that I endured in this thrilling journey.

Last but not least I would like to thank all my friends and my colleagues in the Faculty of Law for all their support.
ABSTRACT

Head of State Immunity in International Law

By: Mawada Siddig Yousif Abu- Agla

The objective of this research is to examine head of state immunity in the light of the recent developments in the international law. In order to achieve this objective it was primarily essential to discuss the jurisprudential rationale of head of state immunity and state immunity in general by shedding a light on some of the main principles; secondly, to compare and contrast the leading cases that have enriched the doctrine of head of state immunity in order to further detect the development of the doctrine; thirdly, the development of the major international criminal tribunals and their effect on the doctrine of head of state immunity and finally the conclusion and recommendations that resulted from the research.

The methodology used in this research is the comparative and analytical approach. This research analyzes the similarities and differences between the common law and continental law and within the common law the US legislation in comparison with the UK legislation. This research also analyzes the different court decisions made on the matter by the House of Lords in the UK and the International Court of Justice. In addition this research also analyzes the development of the international criminal tribunals that deal with the doctrine of head of state immunity.

With the establishment of the United Nations the term absolute sovereignty has shrunk to restrictive sovereignty. A State can no longer act as it pleases within its territory without being reminded by the international community to respect the UN Charter and international law in general. With the change in sovereignty also came a change in immunity granted to the state and the head of state. The change I am referring to is the doctrine of restrictive state immunity which came into effect in the nineteenth century. States were no longer absolutely immune in respect of commercial transactions. This change raised a question as to whether the symbol of sovereignty of the state reflected in its head of state had also restrictive immunity as regards to acts committed by him while in office, in particular international crimes; and if not whether the sovereignty and equality of states will be jeopardized once a foreign court decides to hear a case against the head of state?
المستخلص

العنوان: حصانة رأس الدولة في القانون الدولي

الاسم: مودة صديق يوسف أبو عفالة

هذا البحث هو دراسة حصانة رأس الدولة على ضوء التطورات الأخيرة في القانون الدولي. لتحقيق هذا الهدف كان لا بد أولاً أن نناقش المبادرات الفقهية لحصانة رأس الدولة وحصانة الدولة بصفة عامة من خلال تسليط الضوء على بعض المبادئ الأساسية. ثانياً، مقارنة أهم القضايا التي أثرت في حصانة رأس الدولة وذلك لتحري تطورات المبدأ. ثالثاً، تطور المحاكم الجنائية الدولية الرئيسية ومدى تأثيرها على مبدأ حصانة رأس الدولة. أخيراً، الخاتمة والتوصيات التي نتج عنها البحث.

المنهج المستخدم في هذا البحث هو المنهج المقارن والتحليلي. هذا البحث يقارن أوجه التشابه والاختلاف بين القانون العام والقانون القاري وفي إطار القانون العام التشريعي الأمريكي والتشريع الإنجليزي. هذا البحث يحلل أيضاً الأحكام الصادرة من دار اللوردات بإنجلترا ومحكمة العدل الدولية. بالإضافة لما نقدم نناقش هذا البحث تطور المحاكم الجنائية الدولية وتأثيرها على حصانة رأس الدولة.

مع تأسيس الأمم المتحدة تقلص مصطلح السيادة المطلقة إلى السيادة المقيدة، ولم تعد الدول حرة في أن تصرف كما يحلو لها داخل إقليمها دون أن تدرك من قبل المجتمع الدولي على احترام ميثاق الأمم المتحدة والقانون الدولي بصفة عامة. كما جاء التغيير في مبدأ السيادة جاء أيضاً التغيير في مبدأ الحصانة الممنوحة للدولة ورأس الدولة. التغيير الذي أشر إليه هو حصانة الدولة المقيدة الذي دخل حيز النفاذ في القرن التاسع عشر، فالدول لم تعد تتمتع بحصانة مطلقة حتى كم يتعلق بالمعاملات التجارية. هذا التغيير طرح سؤالاً حول تقييد حصانة رمز سيادة الدولة المتمثل في رأس الدولة فيما يتعلق بالأفعال التي يرتقبها أثناء وجوده في منصب من جرائم دولية، خاصة وإن كانت السيادة والمساواة بين الدول سوف تتعرض للخطر ما إذا قبلت محكمة أجنبية استماع إلى القضية المرفوعة ضد رأس الدولة.
PREFACE

The principle of head of state immunity has recently undergone series of serious developments, which are perhaps an outcome of a movement enhanced by the international community and human rights activists in the aftermath of the Second World War. Their key objective is to put an end to impunity by prosecuting individuals responsible for these atrocities reflected in international crimes such as crimes against humanity, war crimes and genocide regardless of their rank even if they were heads of state. That was an article present in the International Military Tribunal (IMT) at Nuremburg and Tokyo or the Far East and also the International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and finally the Rome Statute of the International Criminal Court (ICC).

The call to impose individual criminal responsibility was settled in cases against a former head of states since the raison d’être behind immunity is no longer present and that is to ensure the sovereignty and equality of states and also to allow the head of state to execute his diplomatic functions effectively without fear of arrest. The crucial point, however, is the movement towards lifting this immunity in cases of international crimes allegedly committed by heads of state still in office.

This research is an endeavor towards establishing a fair understanding of the principle of head of state immunity and possibly to address current international issues on the subject.

I chose this subject for my research because it is of great importance not only to legal field but also to the political field that affects the stability and security of states.
ABBREVIATIONS

All ER  All England Reports
AJIL  American Journal of International Law
CAL L. Rev.  California Law Review
DLJ  Duke Law Journal
EJIL  European Journal of International Law
FSIA  Foreign Sovereign Immunity Act
HR  Human Rights
ICC  International Criminal Court
ICJ  International Court of Justice
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for Former Yugoslavia
IHL  International Humanitarian Law
ILA  International Law Association
ILC  International Law Commission
ILR  International Law Reports
IMT  International Military Tribunal
IMTFE  International Military Tribunal for the Far East
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIA</td>
<td>Sovereign Immunity Act</td>
</tr>
<tr>
<td>SLR</td>
<td>Sydney Law Review</td>
</tr>
<tr>
<td>SPLJ</td>
<td>South Pacific Law Journal</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>VCDR</td>
<td>Vienna Convention for Diplomatic Relations</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention for Law of Treaties</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
</tbody>
</table>
## TABLE OF CASES


- *Ben Aiad v Bey de Tunis (1914) JDI 1290 (Cour d’Alger, 1914) … 23*

- *Dralle v Republic of Czechoslovakia 17 ILR 155 (Supreme Court 1950) … 10*

- *Doe v. United States 860 F.2d 40, 45 (2d Cir. 1988) ..7*

- *Jones v Saudi Arabia UKHL 26 (House of Lords, 2006), available at* [http://www.publications.parliament.uk](http://www.publications.parliament.uk) *…… 60*

- *Marcos and Marcos v Federal Department of Police 102 ILR 198 (Federal Tribunal 1989 (Switzerland 1989) 201 … 27*

- *McLeod – or Caroline- case (1938) 32 AJIL 82 … 20*

- *Gaddafi 125 ILR 490 (France, CA, Court of Cassation, 2000 and 2002) 509..6, 34*

- *The Schooner Exchange V M'Faddon 11 US 116 (US, S Ct, 1812) … 11*

- *Pinochet Case: Regina v. Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)*

  Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional

Propend Finance Pty Ltd v Sing 111 ILR 611 (Court of Appeal, 1997) ..18

Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).... 7

Suleiman Al-Adsani v Government of Kuwait and Others 107 ILR 536 (Court of Appeal, Civil Division) (1996), ..... 46

The Mugabe case- Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) ..8

Wiercinski v Seyyid Ali Ben Hamond (1917) 44 JDI 1465 (France Tribunal civil de la Seine, 1916)... 23
TABLE OF STATUTES

- Foreign Sovereign Immunity Act 1976 (US)
- Sovereign Immunity Act 1978 (UK)
**TABLE OF CONVENTIONS**

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Conflict in the Field. Geneva, 12 August 1949.
- Convention (X) for the Adaption to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907
- Convention on Jurisdictional Immunities of States and their Property 2004
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973
- International Criminal Tribunal for Former Yugoslavia Charter 1993
- International Criminal Tribunal for Rwanda Charter 1994
- International Law Commission 2000
- International Military Tribunal at Nuremburg Charter 1945
- International Military Tribunal of the Far East Charter 1946
- Protocol Additional the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I ), 8 June 1977
- Resolution on Immunities from Jurisdiction and Execution of Heads of Staff and of Government in International Law of the Institute de Droit International (2001)
- Rome Statute 1998
- The New York Convention on Special Missions 1969
- Vienna Convention for Diplomatic Relations 1961
- Vienna Convention for Law of Treaties 1969
1. Introduction

This chapter will discuss the jurisprudential rationale of head of state immunity. It will cover the principles that relate to head of state immunity in a quest to detect the evolution of international law, common law -in particular the United Kingdom and the United States- and civil law in terms of customary international law, international conventions, municipal law and case law.

2. Head of State Immunity

(i) The Evolution of Head of State Immunity

Each State determines for itself who is to fulfill the office of head of state and what are the exact powers attached to it. Both the nature of office – elective or hereditary – and the scope of the function differ vastly from state to state. The office entails largely symbolic functions when in the hands of European royalty or the German or Italian president; while in France or the US it entails real substantive power.\(^1\)

---

Head of state immunity only applies to heads of state in office. Upon abdication a former head of state can only rely on the rule of functional immunity as applicable to all (former) foreign state officials. They are no longer shielded from foreign jurisdiction by any personal immunity, unless of course they are sent on special diplomatic missions by their home state. The consideration that heads of state lose all immunity when they leave office is obviously not incompatible with the operation of the rule of functional immunity.2

The principle of head of state immunity originally developed from the idea of state sovereign immunity, as the state and its ruler used to be deemed one and the same. Yet the treatment afforded to heads of state and other top state officials has also been strongly influenced by the principle of diplomatic immunity, hence, the three concepts of state immunity, diplomatic immunity and head of state immunity have now evolved into doctrines wholly distinct from one another.3

Head-of-state immunity has sought to achieve the goals of both sovereign and diplomatic immunity by (1) recognizing an appropriate degree of respect for foreign leaders as a symbol of their state's sovereign independence; and (2) ensuring that they are not inhibited in performing their diplomatic functions. Heads of state who travel abroad perform crucial and unique diplomatic tasks, and, therefore, a principal purpose of head of state immunity is to allow

2 Id., at 183
state leaders freely to conduct diplomacy in foreign countries. Moreover, ensuring that heads of state may travel freely abroad serves the traditional aims of sovereign immunity, because subjecting a state's leader to the jurisdiction of a foreign court infringes to some degree on that state's sovereignty. 4

Historically, heads of state like states themselves were absolutely immune for acts committed either in a public or a private capacity, and therefore many countries felt no practical need to distinguish between head of state immunity and state sovereign immunity. 5 But as the international community moved toward a restrictive form of sovereign immunity, stripping away a state's immunity for private or commercial acts, it became unclear whether the doctrine of head-of-state immunity would follow that course as well, or whether international law would preserve a greater degree of personal inviolability for world leaders. The shift to restrictive sovereign immunity demonstrated that the policies justifying that doctrine could in some instances be outweighed by other important state interests. Granting immunity to heads of state was justified in part by these very same policies, but also by functional diplomatic considerations. Consequently, nations began thinking about head-of-state immunity as a distinct legal concept, and recognized the need to reconsider the extent to which the goals of sovereign equality and

---

4 Id. at 655-676

functional necessity together could justify exempting heads of state from judicial process abroad.\textsuperscript{6}

During the past few years, the international law of head-of-state immunity has evolved at an astoundingly rapid pace. No treaty has been signed to clarify or alter head-of-state immunity law; instead, the law has changed through the development of international custom. Therefore, to monitor the development of the customary law of head-of-state immunity, one should analyze how national and international courts have addressed recent immunity questions, how states have reacted to these decisions, what actions political branches have taken with respect to immunity issues, and any general statements nations have made about the degree of immunity enjoyed by heads of state.

\textbf{(ii) Distinction between Current and Former Head of State}

Recent state practice has drawn a sharp distinction between former heads of state and current heads of state, as courts across the world have been much more willing to subject former leaders to their jurisdiction.\textsuperscript{7} A recent example is the arrest of former Chilean dictator Augusto Pinochet by British authorities, on an international arrest warrant issued by Spain (discussed further in chapter 2).

\textsuperscript{6} Id. at 656

\textsuperscript{7} See, \textit{e.g.}, Regina v. Bow St. Metro. Stipendary Magistrate, [2000] 1 A.C. 147, 205-06 (H.L. 1999) (denying immunity to Pinochet and allowing the extradition process to proceed on charges of torture in pursuance to a conspiracy to commit torture) cited in Id. at 658
The abrogation of immunity for the private acts of former heads of state, including international crimes in any context, is in harmony with the twin purposes of the head of state immunity doctrine: respecting state sovereign equality and promoting diplomatic functions. Because crimes against humanity, torture, and other international crimes are outside the scope of what can be considered a state's official public functions, seeking accountability for these acts does not infringe on a state's sovereignty, or at least not so much as to outweigh the benefits of stronger human rights enforcement. This is exactly the rationale that led to the adoption of restrictive sovereign immunity for states and nothing suggests that the goal of protecting state sovereign equality should favor a nation's head of state over the state itself. Furthermore, holding former heads of state accountable for their international crimes does not interfere with the goal of promoting diplomatic functions, because exercising jurisdiction over a former leader would not prevent current diplomats from traveling abroad and would not otherwise unduly disrupt international relations.

The Statutes of the International Criminal Tribunals for the Former Yugoslavia⁹ and Rwanda¹⁰ (ICTY and ICTR) and of the International Criminal Court¹¹ (ICC) also provide that sitting heads of state are not immune before those tribunals." United Nations (UN) former Secretary General Kofi

---

⁸ Id. at 660
⁹ ICTY Statute Article 1993 7(2)
¹⁰ ICTR Statute 1994 Article 6(2)
¹¹ Rome Statute 1998 Article 27(1)
Annan echoed that the goal of the ICC is to "ensure that no ruler, no State, no junta, and no army anywhere can abuse human rights with impunity."  

Recent state practice also presents a number of examples that suggest that the doctrine of immunity for current heads of state is still alive and well, even with respect to the most serious international crimes. In March, 2001, France's highest court, the Cour de Cassation, held that Libyan head of state Muammar el-Qaddafi was entitled to immunity in a suit alleging that Qaddafi was responsible for bombing a French DC-10 aircraft in an attack that killed 170 people. The decision reversed a lower court ruling that had refused to recognize the sitting Libyan leader's head-of-state immunity. In Spain, the National Court decided in 1999 that it had no authority to prosecute sitting Cuban head of state Fidel Castro. Similarly, the United States has denied immunity to former heads of state, but has never abrogated the immunity of a sitting head of state or head of government. Furthermore, even though some international agreements have called for stripping away head-of-state immunity, and although some countries have considered taking jurisdiction over foreign leaders, it is significant that no nation has yet gone so far as to actually pass judgment against a sitting head of state.

---


13 Gaddafi 125 ILR 490 (France, CA, Court of Cassation, 2000 and 2002)509 cited in Id. at 663-664

14 Fidel Castro no 1999/2723 (Audiencia Naoianal, 1999) cited in Id. at 664
(iii) The Scope of Head of State Immunity in the United States

In the United States, although the law of diplomatic immunity is governed by an international treaty and the law of state sovereign immunity is governed by an Act of Congress, the Foreign Sovereign Immunities Act (FSIA) 1976, the responsibility for designing legal standards for resolving head-of-state immunity questions has been left to the courts. However, U.S. courts have been reluctant to play too great a role in deciding when to hold foreign leaders accountable for their acts, recognizing that the decision to deny the immunity of a foreign head of state can cause serious international political ramifications. In the case of Doe v. United States,\textsuperscript{15} the Second Circuit explained, “the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state . . . . [B]ecause the field of foreign relations is largely confided to the President by Article II of the Constitution, the executive branch naturally has greater experience and expertise in this area." When the executive branch decides that a foreign leader ought to receive immunity, federal courts accept this determination as binding, deeming it a non-justiciable political question. Consequently, the courts may explore the issue of how much immunity is enjoyed by foreign heads of state only when the executive branch is silent. Still, as the Supreme Court has long emphasized, "In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."\textsuperscript{16}

\textsuperscript{15} 860 F.2d 40, 45 (2d Cir. 1988) cited in Id. at 664

\textsuperscript{16} Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) at 34-35 cited in Id. at 669
From recent case law\(^\text{17}\), one can discern that U.S. courts will recognize the immunity of foreign heads of state for private unofficial acts, even when the executive branch does not suggest immunity, when three conditions are met: (1) the person seeking immunity is a sitting head of state; (2) the United States recognizes that person as the legitimate head of state; and (3) the foreign state has not waived the immunity. This rule applies to all private activity, from commercial behavior to international criminal offenses, and if any of these three criteria is not met, then the defendant is not entitled to immunity in U.S. courts. \(^\text{18}\)

In the *Mugabe* case\(^\text{19}\), the U.S. State Department submitted an official suggestion to the court declaring that President Mugabe should be entitled to head-of-state immunity in U.S. courts. The suggestion stressed that putting President Mugabe on trial would be incompatible with America's foreign policy goals.\(^\text{20}\) Although the *Mugabe* court went on to discuss the domestic and international law of head-of-state immunity in detail, it recognized that no American court has ever ignored a State Department request for immunity for a head of state, and acknowledged that no act of Congress has overturned

\(^{17}\) *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (explaining that the act-of-state doctrine protects officials with sovereign authority acting in their official capacity, but not officials acting privately for personal profit), cited in *Id.* at 669  

\(^{18}\) *Id.* at 669  

\(^{19}\) *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) cited in *Id.* at 668  

\(^{20}\) *Id.* However, some voices within the U.S. government expressed a different view. For instance, U.S. Congressman Henry Hyde warned against using the doctrine of head-of-state immunity to assist a political regime that denied basic democratic rights to its own people. *See* Henry J. Hyde, *U.S. Shouldn't Rush to Protect Mugabe*, CHI. TRIB., Feb. 19, 2001, at 19. ("The State Department must be careful that its desire to support the tradition of reciprocal diplomatic immunity does not lend aid and comfort to a brutal regime's political war on its own citizens.") cited in *supra* 3 note at 674.
this long standing practice. The State Department's determination that granting President Mugabe immunity served American foreign policy interests was therefore wholly conclusive.

Applying the principles recognized by the *Mugabe* court, it is evident that President Mugabe would have been entitled to head-of-state immunity even if the executive branch had not pressed for it. President Mugabe served as the sitting head of state of Zimbabwe, he was recognized as a head of state by the United States government, and Zimbabwe had not waived his immunity. Therefore, he was entitled to travel to the United States without apprehension that he could be placed on trial for his private acts, including even serious violations of international criminal law.

3. State Immunity

(i) Historical Background of State Immunity

In the nineteenth century Belgium and Italy refused to grant foreign states absolute immunity from the jurisdiction of their courts. The restrictive approach to state immunity proved, however, not to be an isolated Belgian and Italian caprice. It spread gradually to other jurisdictions. The restrictive theory was reflected in scholarly efforts to codify the immunity rule. In 1891 under Resolution of the Institut de Droit International certain proceedings against foreign states were declared admissible. Courts were allowed to have jurisdiction *inter alia* regarding actions connected with a commercial or industrial establishment or railway exploited in the territory of the forum state; actions arising out of contracts concluded within that territory of the
forum state; actions arising out of contracts concluded within that territory and actions for damages for a tort or quasi tort there committed.  

The idea that states can, under certain circumstances, be subjected to foreign jurisdiction gained ground rapidly in the second half of the twentieth century. It is in 1950 Austrian case of *Dralle v Republic of Czechoslovakia*  

that is commonly hailed as the landmark of a new era. The Supreme Court, after a careful examination of the practice of various other states, famously stated that:

> The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities... Today, the position is entirely different; States engage in commercial activities and enter into competition with their own nationals and foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and ratione cessante, can no longer be recognized as a rule of international law.  

It was not long when the common law countries adopted the restrictive immunity rule. Ironically common law countries - unlike continental law countries, enacted state immunity acts such as the US Foreign Sovereign Immunities Act 1976 and UK State Immunity Act 1978. They were shortly followed by Singapore, Pakistan, South Africa, Canada, Australia and

---

21 Rosanne Van Alebeek, *supra* note1 at 14,15

22 17ILR 155(Supreme Court 1950) cited in *Id* at 17

23 *Id.* at 16.17,
Argentina. But the courts of New Zealand, Zimbabwe, Kenya and Ireland have applied the restrictive theory in the absence of guidance by the legislature. 24

The prevalence of the restrictive approach is reflected in several conventions and the work of international learned bodies, including the European Convention on State Immunity1972, the UN Convention on Jurisdictional Immunities of States and their Property 2004 and also several draft conventions and resolutions on state immunity, like the Inter-American Draft Convention on Jurisdictional Immunity of States, the Resolution on State Immunity of the Institut de Droit 1992, the International Law Association’s (ILA)Draft Articles for a Convention on State Immunity1994, and the International Law Commission’s(ILC) Draft Articles on Jurisdictional Immunities of States and their Property1991.25

The doctrine of foreign state immunity was born out of tension between two important international law norms, sovereign equality and exclusive territorial jurisdiction. The 1812 decision of the US Supreme Court in the case of The Schooner Exchange V M’Faddon26 is generally held to be the first judicial expression of the rule of foreign immunity. In 1810 the French navy forcibly seized the Schooner Exchange, a ship privately owned by the US nationals, on its way from the United States to the Continent. The ship was

---

24 Id. at 17-18
25 Rosanne Van Alebeek supra note 1 at 19-20
26 11US 116(US, S Ct, 1812) cited in Rosanne Van Alebeek Id. at 12- 13
taken to France, where it was turned into a French warship and renamed the Balaou. A year later the Balaou, under stress of bad weather, made a stop into the port of Philadelphia, the original owners of the vessel filed a claim before the US court, asserting their right of property. Their claim was dismissed on immunity grounds, and the following words of Chief Justice Marshall have since then been quoted in virtually every treatise on state immunity:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a sovereign territory only under an express licence, or in the confidence that the immunities belonging to his independence sovereign status, though not expressly stipulated, are reserved by implication, and will be extended to him.27

The Schooner Exchange was seen to confirm that the recognition of the existence of the sovereignty of the state as an abstract entity, separate and independent from the sovereignty of its personal ruler, entailed the development of the immunity concept shielding that artificial legal concept the state from foreign jurisdiction as well. 28

27 Rosanne Van Alebeek. supra note 1 at 12

(ii) Sources of State Immunity: A Comparison between Common Law and Civil Law

It is necessary to ascertain the source or sources of international law that grant state immunity to foreign states. As mentioned above most of the common law countries have enacted domestic laws that grant them such immunity. As for continental law countries the matter is left to international law to determine their status. Also, a number of multilateral agreements that grant state immunity have been ratified by a few states. So the question of the position of state immunity remains in the states mainly civil law states which have not entered into such conventions. Hence, it was up to international law to find a solution which apparently leads to customary international law as means of enjoying immunity that must be applied domestically by national courts.

A brief look at the civil law literature shows that these countries are firmly committed to the notion that state immunity originates in customary international law. Regarding state immunity, Antonio Cassese writes: “limitations are imposed upon State sovereignty by customary rules.” Jürgen Bröhmer writes: “The law of state immunity as it now stands as a customary rule of international law is commonly based and justified on various general principles of international law.”

29 Antonio Cassese International Law at 91 (2001) cited in Id. at 762

30 Jürgen Bröhmer, State Immunity and the Violation of Human Rights at page 9 (1997) cited in Id. at 762
Bröhmer, like other civil law scholars, appear to accept state immunity’s status as international custom.\textsuperscript{31}

The rationale for the civil law position largely derives from two factors: the civil law constitutional design; and the lack of national immunity legislation in many civil law countries. Perhaps the most interesting aspect about the \textit{Congo V Belgium}\textsuperscript{32} is its rationale for an international rule of state immunity.

Professor Brownlie has observed: “it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law.”\textsuperscript{33} Brownlie suggests that the doctrine of immunity is not a rule of customary international law.

\section{Individual Responsibility as an Exception to Head of State Immunity}

The aftermath of the Second World War led to the establishment of the International Military Tribunal at Nuremberg annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945. Thus, the principle of individual responsibility crystallized in light of this tribunal.

The Tribunal acknowledged the concept of individual responsibility. It states:

\begin{quote}
It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and
\end{quote}

\begin{footnotes}
\item \textsuperscript{31} \textit{Id.} at 763-4

\item \textsuperscript{32} \textit{Arrest Warrant of 11 April 2000(Democratic Republic of Congo V Belgium), Judgment, ICJ Reports 2002 3, available at <http://www.icj-cij.org/} cited in \textit{supra} note 28 at 762

\item \textsuperscript{33} Ian Brownlie, \textit{Principles of Public International Law} at 333 (1979) cited in \textit{Id.} at 763
\end{footnotes}
further, that where the –person- in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal both these submissions must be rejected. The international law imposes duties and liabilities upon individuals as upon States has long been recognized… the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the law of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.

In substance the Geneva Conventions of 1949 provide for individual responsibility for serious breaches of obligations. Parties to the Conventions are under a duty to search for persons, regardless of their nationality, alleged to have committed, or have ordered to be committed a grave breach of a convention and to prosecute them before their own courts.34 The Conventions avoid the term ‘war crimes’ in relation to ‘grave breaches’, but there can be no doubt that the latter constitute war crimes and are concerned with individual responsibility for desire to emphasize the obligations of the contracting States to suppress and punish the acts prohibited. The imposition of this individual responsibility for committing international crimes as

mentioned seeks to prosecute any person regardless of his rank even if he was head of state.

In the Draft Articles by the International Law Commission adopted on second reading, the principle of State Responsibility, though not explicitly stated in the text of the Articles, was clearly stated in the commentary to Article 4 (regarding attribution to the state of the conduct of persons having the status of state organs)\textsuperscript{35} and in the commentary to Article 7 (regarding attribution to the state of the conduct of state officials acting in their capacity as such but outside their competence or in breach of instructions received). The commentary to the latter Article states:

The central issue to be addressed in order to determine the attribution to the State of unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such are so removed from the scope of their official functions that they should be assimilated to those private individuals, not attributable to the State.\textsuperscript{36}

The commentary goes on to clarify Article 7 by stating that:

This indicates that the conduct referred to comprises only the actions and the omissions of organs purportedly or apparently carrying out


\textsuperscript{36} Id. at 898
official functions, and not the private acts or omissions of individuals who happened to be organs or agents of the State.  

Lord Millett formulated official acts as to the commission of acts of torture in the *Pinochet no3* as, ‘official and governmental acts by any standard’. Fox on the other hand pointed out that the absence of immunity for international crimes can only be brought about by the introduction of an exception to state immunity from criminal proceedings in respect of the individuals who commit the crimes. Gaeta argues that this exception exists. He stated that:

> All state officials, including those at the highest level, are not entitled to functional immunity in criminal proceedings- either of a national or international nature- if charged with such offences as war crimes and crimes against humanity…..

It is apparent that this customary rule constitutes an exception to the general rule granting functional immunity to State organs for acts they perform in their official capacity. Clearly, the relationship between the two rules is one of *lex specialis* to *lex generalis*.  

Although head of States or its officials enjoy functional immunity that protects them from prosecution against any offence even international crimes in respect that the head of state or the state official are in office; yet it is apparent from the Pinochet case that this immunity is lifted once his term of office comes to an end in cases of international crimes.

---

37 Id. at 898

38 H Fox 696 cited in Rosanne Van Alebeek, supra note 1 at 224

39 P Gaeta (2002) 982-3 cited in Id. at 224
5. Functional Immunity (Ratione Materiae) \(^{40}\)

The functional immunity of (former) foreign state officials is often approached as a corollary of the rule of state immunity. The reasoning of the UK Court of Appeal in *Propend Finance v Sing*\(^{41}\) is typical in this respect:

The protection afforded by the State Immunity Act to states would be undermined if employees, officers or … ‘functionaries’ could be sued as individuals for matters of state conduct in respect of which the state they were serving had immunity. (The relevant provision of the SIA) must be read as affording individual employees or officials of a foreign state protection under the same cloak as protects the state itself.

(i) Kelsen’s Argument on Immunity of State Officials

Kelsen rationalized the immunity of state officials from the jurisdiction of foreign national courts in the following terms:

No state is allowed to exercise through its own court’s jurisdiction over another state unless the other state expressly consents … Since a state manifests its legal existence only through acts performed by human beings in their capacity as organs of the state, that is to say, through acts of state, the principle that no state has jurisdiction over another state must mean that a state must not exercise jurisdiction through its own courts over acts of another state unless the other state consents. Hence the principle applies not only in case a state as such is sued in a

---

\(^{40}\) Rosanne Van Alebeek. *Id.* at 103, 105-110, 140-1, 145-6, 156

\(^{41}\) *Propend Finance v Sing (UK, 1997)* 669 cited *Id.* at 103
court of another state but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state.\textsuperscript{42}

The immunity of the foreign state official thus appears as logical consequence of the principle of state immunity. It was as a consequence of the rule of state immunity, Kelsen argued, that state officials could not be held personally responsible for acts that can be imputed to the state. It is not difficult to see that the argument necessarily relies on the concept of act of state immunity. The principle of equality and independence of states limits the essential competence of national courts. These principles are compromised if jurisdiction is exercised, either directly or indirectly, over the exclusive competences of a foreign state.

(ii) Non-Personal Responsibility as an Autonomous Principle Preceding State Immunity

The application of the rule of state immunity to foreign state officials can be explained in different terms. As a rule, foreign state officials do not incur personal responsibility for acts committed under the authority of their home state. That this principle is distinct from the law of state immunity is already clear from the fact that state officials may be immune in cases where the state under the restrictive approach to state immunity is not. A claim for payment of, say, pencils ordered for the office a pure \textit{actum jure gestonis} for the purposes of the law of state immunity cannot be recovered from the personal

\footnote{H Kelsen, Principles of International Law (RW Tucker (ed) 2nd 1966) cited in Rosanne Van Alebeek. Id. at 105}
The non-personal responsibility of state officials for acts committed on behalf of the state may be seen to be an autonomous principle that precedes in its operation the application of the rule of state immunity to the facts of a case. While under the reasoning proposed by Kelsen the individual state official cannot be held personally responsible; in the autonomous variant the individual state official bears no responsibility in his personal capacity.

The application of the law of state immunity to cases involving foreign state officials is often premised on the absence of personal responsibility of the state official that happened to have performed the act. Where a claim against a state official personally is not possible, the state is regarded the factual- if not the nominal- defendant when a claim against that official is instigated nevertheless.

(iii) The Principle Identified

The McLeod – or Caroline\(^43\)- case is the classic example of the non-personal responsibility principle in practice. During the Canadian rebellion of 1837 British forces violently captured the two counties. Within the US and especially along the Canadian border sympathy with and even support for the cause of the rebels existed. The British government maintained that the vessel

\(^{43}\) CFRY Jennings. The Caroline and McLeod Cases (1938) 32 AJIL 82 cited Id at 108
was being used as a means of transport for the rebels as well as for the deliverance of supplies to them. The vessel was set afire and abandoned to the current that eventually led it to descend the Niagara falls. In the course of this operation two Americans were killed. The US considered the attack ‘an offense to the sovereignty and the dignity of the United States, being a violation of their soil and territory’ and demanded reparation. The UK emphasized that it concerned an act of necessary self-defence. The negotiations that ensued concentrated on the applicable principles of international law: the law of neutrality, the principle of non-interference, and the rules on self-defense. One issue was added to the negotiations when in November 1840 McLeod a British national was arrested while visiting New York. He was believed to have been one of the officials taking part in the seizure of the Caroline and was indicted for murder and arson.

In the absence of the appropriate legal tools the US government proved incapable of compelling the state of New York to release McLeod. He was eventually acquitted upon proof of alibi in October 1841.

The foreign office sought advice of the Law Officers on the merits of the claim. Their Report reads in relevant part:

The principle of international law that an individual doing a hostile act authorized and ratified by the government of which he is a member cannot be held individually answerable as a private trespasser or malefactor, but that the act becomes one for which the state to which he belongs is in such case alone responsible, is a principle too well established to be now controverted.
The principle of non-personal responsibility for acts committed under authority of a foreign state is still regularly recognized in state practice. De Sena in one of the most comprehensive studies on the functional immunity of foreign state officials has argued that no unitary principle underlies functional immunity practice. He strongly opposes the idea that functional immunity necessarily follows when an individual acts in his quality of agent of the state. According to De Sena the fact that an individual has acted in such quality assumes a different relevance in different contexts.

(iv) Act of State as Act Attributable to the State

Salmon and Watts have argued that the rule of individual responsibility for international crimes means that functional immunity may not be available in respect of these crimes regardless of their official nature. In fact, from their theoretical perspective the argument that international crimes do not qualify as official acts has highly undesirable consequences.

Functional immunity is defeated whenever states agree that state officials may incur individual responsibility while engaged in the exercise of sovereign activity. From this perspective the absence of functional immunity in respect of crimes against international law is obvious.

---

44 P De Sena (1996) cf especially 96-104 cited in Rosanne Van Alebeek supra note 1 at 139-140

45 J Salmon (1994) at 468; A Watts(1994) at 82 and 84 cited in Rosanne Van Alebeek. Id. at 146
6. Personal Immunity (*Ratione Personae*)

(i) Is Personal Immunity Granted in Criminal and Civil Jurisdictions?

Heads of state enjoy an absolute immunity from foreign criminal jurisdiction therefore immunity applies *erga omnes* as does the rule ensuring their inviolability. In comparison, the extent of the head of state’s immunity from foreign civil jurisdiction is subject to considerable academic and judicial controversy. Early case law involving foreign heads of state did not support a rule of personal immunity from civil jurisdiction.46

The 1916 case of *Wiercinski v Seyyid Ali Ben Hamond*47 did in fact make it clear that foreign heads of state were not entitled to additional immunity *ratione personae* from civil proceedings before French courts. The former Sultan of Zanzibar failed to satisfy the bills of a masseur. When civil proceedings were instituted against him, he argued that as a former sovereign he enjoyed the same immunity as a reigning sovereign and that the French courts should therefore refuse to exercise jurisdiction over the claim. The services rendered to the Sultan were qualified as belonging to the private rather than the public sphere and immunity was held to be absent even if he would be able to rely on the same measure of protection after as before his abdication. The same flows from the considerations of the Court of Algiers in *Ben Aiad v Bey de Tunis*48.

---

46 Id. at 169,170-171-172-173,177,184-5-6-8

47 *Wiercinski v Seyyid Ali Ben Hamond* (1917) 44 JDI 1465 (France Tribunal civil de la Seine, 1916) cited in Id. at 171

48 *(1914) JDI 1290 (France Cour d’Alger)* 1291
The cited cases only support immunity from civil jurisdiction to foreign heads of state when they have acted in their official capacity as heads of states. This immunity however does not follow from *ratione personae* considerations but concerns functional immunity *ratione materiae* and the consequent application of the law of state immunity.

It was in the common law countries that the idea of immunity *ratione personae* from civil proceedings was first developed. This immunity was seen to protect a foreign head of state regardless of the private nature of the acts involved, the private purpose of his travels abroad and even when travelling incognito. Thus, when in 1894 the Sultan of Johore – who was temporarily living in the UK under the name of Albert Baker – was sued for breaking of his engagement to Ms Mighell, he was granted immunity from the civil jurisdiction of the UK courts upon revealing his true identity.

The Diplomatic Privileges Act 1964 of the UK gives effect to the 1961 Vienna Convention on Diplomatic Relations (VCDR) and section 20.1 of SIA declares the rules on diplomatic immunity equally applicable to foreign heads of states. Accordingly, the very limited exceptions of article 31 of the Vienna Convention on Diplomatic Relations apply. While the analogical application of article 31.1c VCDR allows foreign heads of states to be sued in relation to professional or commercial activity not related to their official functions and exercised in the UK, this applies to continuous commercial or professional activity. A foreign head of state refusing to pay for services rendered to him in his personal capacity, like the famous example of the
massages of the Sultan of Zanzibar, would be immune from the jurisdiction of the UK courts.

It should further be pointed out that section 20 applies regardless of the official or private nature of the visit of the head of state, or in fact regardless of presence within UK territory whatsoever. While section 20.1 of the UK SIA originally provided for the application of the Diplomatic Privileges Act 1964 to a sovereign or other head of state who is in the United Kingdom at the invitation or with the consent of the government of the United Kingdom, it was later amended to cover all foreign heads of state whether in the UK or not and whether on official business or not.

In the United States the issue of civil suit against foreign heads of state has generated a considerable body of judicial decisions, which in turn has provoked a lively scholarly debate. Since the rule has not been codified in the 1976 FSIA the pre-FSIA practice of conclusive executive suggestion of immunity subsists. The State Department proceeds from the principle that all persons it recognized as the legitimate head of a foreign state enjoy absolute immunity from the civil jurisdiction of US courts. In 1965 the head of state of Saudi Arabia, King Faisal Bin Abdull Aziz Al-Saud was named as defendant in a civil suit before US courts. The state department had recognized his immunity as head of state and hence suspended proceedings. Hence there is no difference between the SIA and the FSIA since they both grant immunity to the head of state.  

49 Rosanne Van Alebeek supra note 1 at173
The guidance provided by treaty law on the issue is limited and generally unhelpful. Article 21.1 of the 1969 Special Missions Convention provides that a head of state who leads a special mission enjoys the facilities, privileges and immunities accorded by international law to heads of state on an official visit. Article 3.2 of the 2004 Convention on Jurisdictional Immunities of States and their Property reflects the final Draft of the International Law Commission and provides that ‘[t]he present convention is without prejudice to privileges and immunities accorded under international law to leads of state ratione personae.’ The conclusion that head of states immunity ratione personae -which is head of state immunity- is not affected by the rules on state immunity ratione materiae leaves us empty-handed.

The Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in international law adopted by the Institute de Droit International in 2001, adopts a restrictive approach. Article 3 provides that ‘[i]n civil and administrative matters, the Head of State does not enjoy any immunity from jurisdiction before the courts of a foreign state, unless that suit relates to acts performed in the exercise of his or her official functions. Nonetheless, nothing shall be done by way of court proceedings with regard to the head of State while he or she is in the territory of that state, in the exercise of official functions’.

(ii) Family Members: A Belgian court considered in a 1988 case concerning a civil claim instituted against the Zairian president Mobutu, his wife and his children that in contrast to the head of state itself, his family members could not rely on a rule of immunity from jurisdiction. The Swiss
Federal Tribunal considered in the 1989 case of *Marcos and Marcos v Federal Department of Police*\(^50\) that:

Customary international law has always granted to heads of state, as well as to the members of their family and their household visiting a foreign state, the privileges of personal inviolability and immunity from criminal jurisdiction. This jurisdictional immunity is also granted to a Head of State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff. Accordingly, such persons cannot be the subject of criminal proceeding or even of a summons to appear before a court.

The UK State Immunity Act 1978 provides a very extensive immunity to family members forming part of the household of a foreign head of state, as well as to private servants. Under section 20.1.b and c these individuals have a right to the same immunity as family members and servants of diplomatic agents on the Vienna Convention of Diplomatic Relations. In contrast, the Australian Foreign States Immunities Act limits the application of the law of diplomatic immunity to the spouse of the head of state.

The US approach is consistent in that it relies on executive rather than judicial decision-making as mentioned earlier in comparison to the UK approach which uses both precedents and legislation.

\(^{50}\) *Marcos and Marcos v Federal Department of Police* 102 ILR 198(Federal Tribunal 1989 (Switzerland 1989)201 cited in *supra* note 1 at 184-185
(iii) Is Immunity Granted to Heads of Government and Ministers of Foreign Affairs?

Article 15 of the Resolution on Immunities from Jurisdiction and Execution of Heads of Staff and of Government in International Law of the Institute de Droit International (2001) provides that:

1. The Head of Government of a foreign state enjoys the same inviolability, and immunity from jurisdiction recognized, in this resolution, to the head of state.

2. Paragraph 1 is without prejudice to such immunities to which other members of the government may be entitled on account of their official function.

The immunity applicable to ministers of foreign affairs was the principle in question in the Congo v Belgium litigation before the International Court of Justice at the time the Resolution on Immunities from Jurisdiction and Execution of Heads of Staff and of Government in International Law of the Institute de Droit International (2001) was adopted.

The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomats, distinguishes the position of heads of state from that of heads of government and ministers of foreign affairs. Article 1 provides that for the purposes of the convention ‘internationally protected person’ means:

---

- Head of state, including any member of a collegial body performing the functions of a Head of State under the constitution of state concerned, a Head of Government or a minister for foreign affairs, wherever any such person is in a foreign state, as well as members of his family who accompany him;

- Any representative or official of a state or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

Also article 21 of the 1969 Convention on Special Missions intimates a difference between the position of heads of state on the one hand and that of heads of government and ministers of foreign affairs on the other. The article reads as follows:

1. The Head of the sending state, when he leads a special mission, shall enjoy in the receiving state or in a third state the facilities, privileges and immunities accorded by international law to heads of state on an official visit.

2. The head of the government, the Minister for foreign affairs and other persons of high rank, when they take part in a special
mission of the sending state, shall enjoy in the receiving state or in a third state, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.

In *Oppenheims’s International Law* we read that the head of government ‘does not represent the international persona of the state in the same way in which the Head of State does.’ Watts elaborated on this theme stating that ‘heads of government and foreign ministers… do not symbolize or personify their states in the way that heads of states do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally.’ The argument against equating the immunity of heads of government and ministers for foreign affairs with the immunity of heads state is therefore a strong one.

7. Command Responsibility of the Head of State

(i) The Roots of Command Responsibility

One of the earliest recorded legal instruments was in a 1439 Ordinance, issued by Charles VII of France, denoting the criminal responsibility of his military commanders for failing to prevent or punish offences committed by troops under their command. The same concept is also encountered in the ‘Articles of Military Lawwers to be observed in the Warres’ promulgated by King Gustavus Adolphus of Sweden in 1621. Similarly, although unsure as to

---

52 R Jennings and A Watts (eds) (1992) I 1033 cited in Rosanne Van Alebeek. Id. at 194

53 A Watts (1994) 102 cited in Rosanne Van Alebeek. Id. at 194
whether a prince could be held criminally responsible, Grotius maintained that princess carried some responsibility for failing to prevent or punish the unlawful acts of their subjects. Moreover, although in the time of Henry V of England the prevailing legal attitude militated against holding kings to account for the acts of their troops (response non sovereign), Shakespeare argued that leaders should be held accountable because they are in command of their troops and have the authority to declare war.\textsuperscript{54}

It was not until 1907 Hague Peace Conference that the concept of responsible command was incorporated, without any express reference to criminal liability, in an international legal instrument. The Regulations annexed to Hague Convention IV provided in Article 1 that in order for a party to a conflict to be afforded lawful belligerent status, it had to be ‘commanded by a person responsible for his subordinates’. Moreover, Article 43 of these Regulations required that military superiors who were in command of occupied territory:

> “Take all measures in [their] power to restore and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country.”

Similarly, Article 19 of the 1907 Hague Convention X provided that naval commanders have a task of overseeing the ‘execution of … the general principles of the Convention’. The Commission on the Responsibility of the Authors of the War and Enforcement of Penalties, established in the

\textsuperscript{54} Ilias Bantekas. Principles of Direct and Superior Responsibility in International Humanitarian Law. at 69-70,73,81and 82 (2002)
aftermath of World War I, concluded that proposed tribunal be given jurisdiction over persons: “Who ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent putting an end to or repressing violations of the laws or customs of war.”

- The International Military Tribunal Nuremberg did not concern itself with the doctrine of command responsibility since the accused were charged with having planned and ordered the relevant offences, but the International Military Tribunal for the Far East found the doctrine appropriate for its proceedings, as did many post-World War II military tribunals. Despite their rich jurisprudence, no express provision on superior responsibility was contained in the 1949 Geneva Conventions. This resulted in the decline in the use of the doctrine for a period of over thirty years, which was due in a large part to cold war rivalries, but was also associated with the difficulties in identifying hierarchical structures in the context of civil wars. Additionally, no consensus on an appropriate international _mens rea_ could be reached. Significant progress was made with the inclusion of Articles 86 and 87 of the 1977 Protocol Additional the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I ), but it was not until the Yugoslav and Rwandan civil conflicts that the doctrine was applied to modern warfare, which in turn paved the way for its incorporation in the Statute of the International Criminal Court 1998.

(ii) Liability of Superiors

Liability incurred as a result of illegal acts committed by others is expressly defined in the ICTY and ICTR Statutes. Article 7(3) of the former, followed
verbatim in the Article 6(3) of the ICTR Statute, provides for the criminal responsibility of the superior:

If he knows or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Superiors do not incur liability for the crimes of their subordinates simply because they happen to occupy that position. Rather, the doctrine of superior responsibility is premised on the following elements: (1) the existence of a superior-subordinate relationship; (2) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof.

During the preparatory conferences that led to the adoption of the 1977 Protocol I, where reference to ‘commanders’ in Article 87 encompassed persons in command ‘at the highest level to leaders with only few men under their command’. This consistent irrelevance of rank in attributing superior responsibility indicates that the international lawmaking institutions look at actual and effective control, rather than formality. This is also the case with Article 28 of the ICC Statute, and represents long-standing practice in international law. Article 87 of Protocol I extends the legal obligations of commanders beyond troops under their command to encompass in addition ‘other persons under their control’. Their obligation is applicable to superior at all levels of command. If the case were different, superiors with ample
means to intervene in crimes committed by troops under their control, but not under their command, would be fully justified in being passive. Accordingly, the concept of ‘command’ is not the only operative term for ascribing command liability, as the text of Article 87 extends the obligations of commanders to troops under their control. The concept of ‘superiority’ is therefore a broad one and should be viewed in terms of a hierarchy encompassing the concept of control.

Superiors are criminally liable for the crimes of their subordinates only if they possessed the material ability to prevent and punish such crimes. This material ability may be either de jure or de facto in nature.

Another category of individuals whose activity may be attributed to a state is that of de facto state organs. These are individuals who, although they do not have the formal status and rank of state officials, in fact act on behalf of state. They can be so regarded when they (i) act under instruction from a state or (ii) act under the overall control of a state, or (iii) in fact behave as state officials. A recent case may be recalled of Gaddafi\textsuperscript{55}. On 20 October 2000 the Paris Court of Appeals ruled that it was permissible to prosecute in France the Libyan leader Muamar Qaddafi for complicity in murder of French nationals in relation to a terrorist act that is the bombing of a French airline over Niger in 1989. When it was objected that under the Libyan constitution Qaddafi was not head of state or Government, the French Foreign Ministry issued a press release stating among other things that the whole of the international community considers Qaddafi as the head of the Libyan state,

\textsuperscript{55} 125 ILR 490 (France, CA, Court of Cassation, 2000 and 2002)
and drawing attention to the fact that when international summits are convened it is Qaddafi who represent Libya. The press release declared that:

We consider as a matter of the head of state of Libya … its Colonel Qaddafi who is invited; nobody has ever thought that there might be anybody other than him to be regarded as head of state.

The rule is to some extent codified in article 5 of the ILC Draft (2000), which concerns public entities that are not state organs under national law. Under this article ‘the conduct of an entity which is not an organ of the state … but is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the entity was acting in that capacity in the case in question.’

8. International Human Rights versus Immunity

The world is undergoing series of changes in the scope of international human rights law as well as the development of international criminal law; hence immunity rules granted by international law to states and in turn heads of state and their officials are directly affected by their presence.

Judge Rosalyn Higgins has counseled: “It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction.” However, by understanding that “[I]t is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic

56 Antonio Cassese. *International Law* at 189-190 (2001)
rule of immunity,” the possibilities for meaningful and effective human rights litigation emerge. With jurisdiction as the rule and immunity as the exception, it is incumbent upon the foreign state defendant, not the individual plaintiff, to point to the rule, domestic or international, that requires immunity.57

1. Theories that Lift State Immunity for Human Rights Violations

We will discuss two theories the first theory is the Normative Hierarchy Theory and the second theory is the Theory of Collective Benefits developed by Caplan.

(i) The Normative Hierarchy Theory

The theory operates conceptually on the international law level, as one norm of international law, *jus cogens*, trumps another, state immunity, because of its superior status. The theory thus assumes that state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law.58

(a) The Americans approach: The U.S. Supreme Court’s decision in *Argentine Republic v. Amerada Hess Shipping Corp.*59. In that case, the plaintiffs sued in tort to reclaim losses arising out of the unprovoked bombing of an oil tanker on the high seas by the government of Argentina, allegedly a violation of international law. The Court ruled that the FSIA was “the sole

58 *Id.* at 743-744
basis for obtaining jurisdiction over a foreign state” in U.S. courts. Moreover, the Court held that American courts may hear suits against foreign states only where Congress has explicitly provided a statutory exception to the FSIA’s general rule of immunity. A suit involving an armed attack against a ship on the high seas was not one over which Congress had intended the courts to exercise jurisdiction, the Court found, and thus it rejected the plaintiffs’ claim.

The Court’s restrictive interpretation of the FSIA’s exceptions to immunity prompted a group of three law students to publish an inventive Comment in 1991 entitled *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*. The authors propose that states lose all entitlement to state immunity under international law when they injure individuals in violation of *jus cogens* norms. Their theory starts from the premise that, following the Nuremberg trials, the structure of international law changed; in particular, the “rise of *jus cogens*” placed substantial limitations on state conduct in the name of peaceful international relations. Indeed, “[b]ecause *jus cogens* norms are hierarchically superior to the positivist or voluntary laws of consent; they absolutely restrict the freedom of the state in the exercise of its sovereign powers.”

*Jus cogens* norm “is a norm accepted and recognized by the international community of state as a whole as a norm from which no derogation is

60 77 CAL. L. REV. 365 (1989) cited in Lee M. Caplan *Id.* at 766

61 *Id.* at 766
permitted and which can be modified only by a subsequent norm of general international law having the same character.” 62

Hence, their theory concludes that regardless that the scope of the term *jus cogens* has not been completely defined—so far certain norms such as prohibition against piracy, slavery, genocide, aggression and torture are within the scope—and since sovereign immunity is not regarded as a *jus cogens’s* norm, it is deduced that the *jus cogens’s* norm is superior to sovereign immunity. Therefore in case these two norms conflict then *jus cogens* will prevail so as to protect human rights. This prevalence is impliedly given by the foreign state offender and requires no consent as to the waiver of immunity for being tried in court. Thus immunity is not regarded as a defense.

Professor Cassese in support of this theory stated that, “peremptory norms [or *jus cogens*] may impact on State immunity from the jurisdiction of foreign States, in that they may remove such immunity.”63

(b) The European Approach: to this matter was mainly a jurisprudential development that came naturally as we mentioned previously that civil law countries did not enact state immunity legislations. Instead they relied on their constitutions which required them to take guidance from international law when it comes to sovereign immunity. In this matter according to


63 Antonio Cassese *supra* note 19 at 145 cited in Lee M. Caplan. *Id.* at 768
Bianchi, ensuring that the application of international law produces just results requires judges to undertake a “value-oriented” interpretation of international law norms, giving preference to peremptory norms, such as the protection of human rights, over norms of lesser importance, such as state immunity. This opinion was put to action in the case of *Prefecture of Voiotia v. Federal Republic of Germany*.

(ii) The Theory of Collective Benefits: The raison d’être behind state immunity under customary international law which is to allow foreign states to function within the forum state without any fear of seizure or jurisdictional free from arrest, or adverse legal proceedings for purposes of executing their public functions effectively. Applying these factors to the world today, especially with the introduction of the concepts of globalization and the restrictive sovereignty that was injected by the UN Charter 1945 – which stipulates several principles restraining state behaviour, including the obligation to uphold the principles of sovereign independence, the peaceful settlement of disputes, and the protection of human rights- the foreign state can no longer act recklessly and must respect rules stipulated under international customary law that granted it immunity and the rules of conduct under international agreements. Thus, in case of any human rights violation immunity will be denied. This approach was discussed in the *Arrest Warrant*.

---


Prefecture of Voiotia—mentioned above—conforms with the theory of collective state benefit for many of the same reasons as the 1996 FSIA amendment which introduced an additional exception to the immunity of certain foreign states for a limited range of human rights violations. The infliction of wanton terror on Greek civilians by the Nazis during World War II was a direct affront to the vital interest of Greece, the forum state. Regardless of the label it bears, sovereign, military, jure imperii, or otherwise, a foreign state’s unlawful killing of the forum state’s civilians destroys bilateral relations between forum and foreign state and may even jeopardize the security and stability of the community of states. Thus, putting aside its endorsement of the normative hierarchy theory, Prefecture of Voiotia represents a legitimate solution to the human rights litigation problem.67

Taken together, the 1996 FSIA amendment and Prefecture of Voiotia demonstrate that progress can be made in resolving the human rights litigation problem in a manner consistent with the true nature of the doctrine of foreign state immunity. That is to say that the forum state, through the agent it designates to create and interpret foreign state immunity law (the U.S. Congress in the case of the 1996 amendment and the Hellenic Supreme Court in the case of Prefecture of Voiotia), is empowered to modify foreign

66 Id at 777-778.
67 Id. at 780
state immunity law to an extent consistent with the theory of collective state benefit. These developments further show that such modifications are possible in two very different legal settings: the 1996 amendment arose in a common law country with national immunity legislation, while *Prefecture Voiotia* resulted from the jurisprudential application of international law in a civil law country without national immunity legislation.68

9. Universal Jurisdiction versus Immunity

Universal jurisdiction is carte blanche which allows national courts to prosecute any person even with immunity for crimes that violate international human rights law. International legal practice over the centuries has rendered several offenses susceptible to universal jurisdiction. Historically, acts of piracy on the high seas and slave trading were branded international crimes, with their perpetrators made subject to universal jurisdiction by any government who could apprehend the offenders.69 In the Nuremberg Trials following the Second World War, the International Military Tribunal defined "[a]n international crime as ... an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."70 Hence, jurisdiction over these crimes must be international as well. International

---

68 Id. at 780


70 Statute of the International Military Tribunal at Nuremberg 1945
crimes such as genocide, crimes against humanity, aggression, torture, crimes against the peace and war crimes those acts have been expressly prohibited by international law. Immunity from adjudication is no longer a resort for impunity.

Jurisdiction is defined as "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicailly and non-judicially." 71

Traditionally, a state may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. The jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce. Extraterritorial jurisdiction, therefore, involves a two-step process. First, it must be determined whether a domestic law exists that covers the offensive act. Second, it must be ascertained whether a sovereign state may, under international law, prescribe such conduct extraterritorially. The universality principle, which holds that some crimes are so universally abhorrent and thus condemned that their perpetrators are hostis humani generis enemies of all people and allows that jurisdiction, may be based solely on securing custody of the perpetrator.

Universal jurisdiction assigns a state the authority to prosecute a criminal under its own law, rather than that of the state where the crime was committed. This principle is grounded in the assumption that the prosecuting state is acting on behalf of all states. In the case of war criminals, unless the

---

perpetrator or his victims are citizens or residents of the state wanting to prosecute, any assertion of authority to prosecute an alleged offender must be based on the principle of universal jurisdiction. Since atrocities committed as war crimes are committed only in some states, but outside the territory of most others, against persons who were residents and citizens of the former other states, none of the other jurisdictional principles apply. The only basis for prosecuting perpetrators of war crimes or crimes against humanity by other governments is the discovered presence of the criminals in some state and the moral obligation of that government to bring them to justice on behalf of the international community. Universal jurisdiction furnishes the legal basis for exercising that moral obligation.

The international legal norms of _erga omnes_ and _jus cogens_ lend support to the role that universal jurisdiction can play in obtaining jurisdiction over war crimes offenders. Obligations _erga omnes_ are literally obligations that "apply to all." Obligations owed by a state to the international community as a whole are the concern of all states. All states have a legal interest in their protection, and these are therefore obligations _erga omnes._

Examples of some practices of the principle of universal jurisdiction can be reflected in the following treaties such as the US in the treaties on terrorism and aircraft hijacking dating from 1970 as well as serious crimes committed abroad. Universal jurisdiction was also the concept that allowed Israel to try Adolf Eichmann in Jerusalem in 1961.

Also in international conventions such as the Torture Convention of 1984, ratified by 124 governments requires states either to prosecute any suspected
torturer found on their territory, regardless of where the torture took place, or to extradite the suspect to a country that will do so. Similarly, the Geneva Conventions of 1949\textsuperscript{72} on the conduct of war, ratified by 189 countries require each participating state to "search for" persons who have committed grave breaches of the conventions and to "bring such persons, regardless of nationality, before its own courts."\textsuperscript{73}

10. Conclusion

Commercial transactions between states have led to the modification of the absolute immunity doctrine to become restrictive. The recent movement in the development of the international human rights law in the aftermath of the Second World War, followed by the establishment of the United Nations compelled the world to take a pause and address the issue of prosecuting the individuals responsible for these massacres. This led to a development of new genera of international criminal law that advocates the prosecution of individuals in contrast with state responsibility. Yet the differentiation between the current head of state and former head of state is apparent in the case law presented in this chapter. Although proponents of human rights advocate that head of state immunity is lifted automatically when a violation in terms of international crimes takes place we find that the case law

\textsuperscript{72} Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Conflict in the Field. Geneva, 12 August 1949 at article 49, Convention (II) for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 at article 50, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 at article 129. Convention (IV) relative Protection of Civilian Persons in War. Geneva, 12 August 1949 at article 146.

\textsuperscript{73} Kenneth Roth. The Case for Universal Jurisdiction. www.foreignaffairs.com/issues/2001/80/5 Volume 80, Number 5( September/October, 2001) at 1-2
disagrees in cases of current head of state but in cases of former head of state there is an agreement that immunity is lifted since he no longer fulfills the position of head of state
CHAPTER TWO
ADJUDICATION

1. Introduction

This chapter will highlight some of the leading cases that shaped the jurisprudence of head of state immunity. These cases will discuss immunity in the cases of former and current head of states and their officials in application of the principles discussed in Chapter One.

2. *Suleiman Al-Adsani v Government of Kuwait and Others* Court of Appeal (Civil Division) (1996)¹

The facts of this case may be summarized as follows.

The applicant, who had joint British and Kuwaiti citizenship, was a trained pilot. He went to Kuwait in 1991 to assist in its defence against Iraq. During the Gulf War he served as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sexual video tapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who is related to the Emir of Kuwait and is said to have an influential position in Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh.

¹ [www.westlaw.com](http://www.westlaw.com) (2009) at 1,4-7
After the Iraqi armed forces were expelled from Kuwait, on or about 2\textsuperscript{nd} May 1991, the Sheikh and two others gained entry to the applicant's house, beat him and took him at gun-point in a government jeep to the Kuwaiti State Security Prison. The applicant was falsely imprisoned there for several days during which he was repeatedly beaten by security guards. He was released on 5\textsuperscript{th} May 1991, having been forced to sign a false confession.

On or about 7\textsuperscript{th} May 1991 the Sheikh took the applicant at gunpoint in a government car to the palace of the Emir of Kuwait's brother. At first the applicant's head was repeatedly held underwater in a swimming pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol, as a result of which the applicant was seriously burnt.

Initially the applicant was treated in a Kuwaiti hospital, and on 17\textsuperscript{th} May 1991 he returned to England where he spent six weeks in hospital being treated for burns covering 25 per cent of his total body surface area. He also suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder, aggravated by the fact that, once in England, he received threats warning him not to take action or give publicity to his plight.

On 29\textsuperscript{th} August 1992 the applicant instituted civil proceedings in England for compensation against the Sheikh and the Government of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well-being made after his return to the

The proceedings were re-issued after an amendment to include two named individuals as defendants. On 8th July 1993 a deputy High Court judge *ex parte* gave the applicant leave to serve the proceedings on the individual defendants. This decision was confirmed in chambers on 2nd August 1993. He was not, however, granted leave to serve the writ on the Kuwaiti Government.

The applicant submitted a renewed application to the Court of Appeal, which was heard *ex parte* on 21st January 1994. Judgment was delivered the same day. The court held, on the basis of the applicant's allegations, that there were three elements pointing towards governmental responsibility for the events in Kuwait: first, the applicant had been taken to a State prison; secondly, Government transport had been used on 2nd and 7th May 1991; and, thirdly, in the prison he had been mistreated by public officials. It found that the applicant had established a good arguable case, based on principles of international law, that Kuwait should not be afforded immunity under section 1(1) of the State Immunity Act 1978 ("the 1978 Act") in respect of acts of torture. In addition, there was medical evidence indicating that the applicant had suffered damage (post-traumatic stress) while in the United Kingdom. It followed that the conditions in order 11 rule 1(f) of the Rules of the Supreme Court had been satisfied and that leave should be granted to serve the writ on the Kuwait Government.
The latter, after receiving the writ, sought an order striking out the proceedings. The application was examined; *inter partes*, by the High Court on 15\(^{th}\) March 1995. In a judgment delivered the same day the court held that it was for the applicant to show on the balance of probabilities that the Government of Kuwait were not entitled to immunity under the 1978 Act. It was prepared provisionally to accept that the Government was vicariously responsible for conduct that would qualify as torture under international law. However, international law could be used only to assist in interpreting lacunae or ambiguities in a statute, and when the terms of a statute were clear, the statute had to prevail over international law. The clear language of the 1978 Act bestowed immunity upon sovereign States for acts committed outside the jurisdiction and, by making express provision for exceptions, it excluded as a matter of construction implied exceptions. As a result, there was no room for an implied exception for acts of torture in section 1(1) of the 1978 Act. Moreover, the court was not satisfied on the balance of probabilities that the Kuwaiti Government were responsible for the threats made to the applicant after 17\(^{th}\) May 1991. As a result, the exception provided for by section 5 of the 1978 Act could not apply. It followed that the action against the Government should be struck out.

The applicant appealed and the Court of Appeal examined the case on 12\(^{th}\) March 1996. The Court held that the applicant had not established on the balance of probabilities that the Kuwaiti Government was responsible for the threats made in the United Kingdom. The important question was, therefore,
whether State immunity applied in respect of the alleged events in Kuwait. Lord Justice Stuart-Smith finding against the applicant, observed:

"Jurisdiction of the English court in respect of foreign States is governed by the State Immunity Act 1978. Section 1(1) provides:

'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. ...'

... The only relevant exception is section 5, which provides:

'A State is not immune as respects proceedings in respect of--

(a) death of personal injury ... caused by an act or omission in the United Kingdom.'

It is plain that the events in Kuwait do not fall within the exception in section 5, and the express words of section 1 provide immunity to the First Defendant. Despite this, in what [counsel] for the Plaintiff acknowledges is a bold submission, he contends that that section must be read subject to the implication that the State is only granted immunity if it is acting within the Law of Nations. So that the section reads: 'A State acting within the Law of Nations is immune from jurisdiction except as provided ...' ... The argument is ... that international law against torture is so fundamental that it is a jus cogens or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity. No authority is cited for this proposition. ... At common law, a
sovereign State could not be sued at all against its will in the courts of this country. The 1978 Sovereign Immunity Act, by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable; it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification.

... A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination.”

The other two members of the Court of Appeal, Lord Justice Ward and Mr. Justice Buckley, also rejected the applicant's claim. Lord Justice Ward commented that "there may be no international forum (other than the forum
of the *locus delicti* to whom a victim of torture will be understandably reluctant to turn) where this terrible, if established, wrong can receive civil redress”.

On 27th November 1996 the applicant was refused leave to appeal by the House of Lords. His attempts to obtain compensation from the Kuwaiti authorities via diplomatic channels have proved unsuccessful.

3. **Pinochet Case:** *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent)* *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) on 25 November 1998*

The facts of this case may be summarized as follows.

Senator Pinochet was the Head of State of Chile from 11 September 1973 until 11 March 1990. It is alleged that during that period there took place in Chile various crimes against humanity (torture, hostage taking and murder) for which he was knowingly responsible.

In October 1998 Senator Pinochet was in this country- UK- receiving medical treatment. In October and November 1998 the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face trial for those alleged offences. The Spanish Supreme Court has held

---

2 [http://www.publications.parliament.uk](http://www.publications.parliament.uk)
that the courts of Spain have jurisdiction to try him. Pursuant to those international warrants, on 16 and 23 October 1998 Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested.

Pinochet immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed and nothing further turns on that warrant. The second warrant of 23 October 1998 was quashed by an order of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins and Richards JJ.). The reasoning C.J. made was that General Pinochet had functional immunity when these acts were committed as head of state of Chile. The legal basis was article 20 of the SIA that grants heads of state similar privileges and immunity to the head of the diplomatic mission according to VCDR 1961. This judgment was inspired by the Al Adsani v The Government of Kuwait (1996) that granted state immunity to the state for acts of torture hence a head of state in similar circumstances is entitled to immunity too.3

However, the quashing of the second warrant was stayed to enable an appeal to be taken to The House of Lords on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State."

---

The House of Lords in November 25th 1998 reversed the decision of the lower court in a decision of two to three and held that a former head of state is not entitled to immunity for acts of torture, hostage taking, crimes against humanity and murder committed while he was in office. Lord Nicholls in his own opinion that was concurring by Lord Hoffman held that international law in light of which domestic law has to be interpreted ‘has made it plain that certain types of conduct… are not acceptable on the part of anyone’ and that ‘the contrary conclusion would make a mockery of international law’. In his view Pinochet was not entitled to immunity under article 20 of SIA since the immunity is granted to the functions heads of state which are recognized by international law irrespective of the domestic law. Nor does he enjoy the residual immunity granted by customary international law. In addition, conventions on Torture and Hostage Taking have permitted the extraterritorial exercise of criminal jurisdiction in municipal courts. On similar lines Lord Steyn delivered a similar reasoning that torture, genocide, crimes against humanity and hostage-taking which are condemned by international fall beyond the functions of the head of state hence waiving his immunity.4

4. Congo V. Belgium (The Arrest Warrant Case) ICJ 20025

The facts of this case may be summarized as follows.

4 Id at 240-1

5 http://www.icj-cij.org
In April 2000, a Belgian investigating magistrate issued “an international arrest warrant in absentia” against the incumbent Minister for Foreign Affairs of the Congo Mr. Abdoulaye Yeordai Ndombasi, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity under the principle of universal jurisdiction. The arrest warrant was internationally circulated through Interpol.

The Congo brought a suit against Belgium in the International Court of Justice (ICJ) asking it to declare that Belgium, by issuing the international arrest warrant, violated the legal obligation Belgium owes to the Congo and that Belgium must therefore cancel the arrest warrant.

By the time the case was argued before the ICJ, Mr. Yerodai, the person in question was no longer the Foreign Minister of the Congo. On this ground Belgium tried to unsuccessfully argue before the ICJ that the case was 'moot'.

The Congo based its sole argument on the ground that since the arrest warrant was directed at the time of issue against an incumbent Foreign Minister who is immune from the judicial process of other courts, Belgian was in breach of international law.

The court referred to conventions such as VCDR 1961 and The New York Convention on Special Missions 1969 provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. Hence, the court decided to rely on customary international law to address the question of immunity of the Minister of Foreign Affairs. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she
when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

None of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly noted that those decisions are in no way at variance with the findings it has reached.

The Court emphasized, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

The court continued to elaborate on the issue of immunity and impunity by stating that: “the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may
thus be tried by those countries’ courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “[i]mimmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

State officials who commit international crimes do so in their ‘private capacity’ and not their ‘official capacity’ hence overruling the state’s responsibility for his actions and concurring individual responsibility on this official.
The Court, by a solid majority, accepted the Congo's contention. It held that even in cases of persons accused of war crimes and crimes against humanity incumbent Minister of Foreign Affairs have, under the principles of customary international law, absolute immunity from another nation's judicial processes.

There were dissenting opinions to what might be considered this 'traditionalist' ruling of the ICJ. Judge Al-Khasawneh (from Jordan) dissented stating that "the need for effective combating of grave crimes ... represents a higher norm than the rules of immunity' especially in cases of Foreign Ministers whose immunity under international law are not as clear or categorical as 'the immunities of diplomats and Heads of States'.

Due to a technicality, the tenability or otherwise of the claim of universal jurisdiction by domestic courts was not directly ruled upon by the ICJ in this case. In a separate opinion and as an observation, the President of the ICJ, Judge Guillaume expressed his view that 'under the law as classically formulated ... only the crimes of piracy' and a few others in which 'the offender is present on [the] territory [of the state claiming universal jurisdiction] does international law accept universal jurisdiction'. However in the joint separate opinions of Judge Rosalyn Higgins, Judge Koijmans and Buergenthal argued that though they agreed with the majority ruling, 'the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant for the arrest of Mr. Yerodia did not as such violate international law'.

---

On 14th February 2002, the International Court of Justice (ICJ) announced its ruling by a vote of thirteen votes to three that the arrest warrant of 11th April 2000 against Mr. Abdulaye Yerodia Ndombasi, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law. Foreign Ministers cannot be indicted by the courts of another nation and any arrest warrant issued by the courts or executive officials of one country against a Foreign Minister of another country is, in effect, a violation of international law. And this would be so even if the Foreign Minister in question had been formally indicted on grounds of 'universal jurisdiction' for crimes against humanity. By ten votes to six, the ICJ also ruled that Belgium must 'by means of its own choosing' cancel the arrest warrant.
5. Jones (Respondent) v. Ministry of Interior Al -Mamlaka Al –Arabiya ASSaudiya (the Kingdom of Saudi Arabia) (Appellants)

-Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)

-Jones (Appellant) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) [2006] UKHL 26

The facts of this case may be summarized as follows.

On 6th June 2002 Mr. Jones, brought an action before the High Court against two defendants: the Ministry of Interior of the Kingdom of Saudi Arabia (“The Kingdom”), which (it is accepted) is for present purposes the Kingdom itself; and Lieutenant Colonel Abdul Aziz, sued as servant or agent of the Kingdom. He claimed aggravated and exemplary damages for assault and battery, trespass to the person, false imprisonment and torture in the Kingdom between March and May 2001. Permission was granted by Master Whitaker ex parte to serve the Kingdom out of the jurisdiction, and service was duly effected. Further permission was granted to serve Colonel Abdul Aziz, but he was not served. The Kingdom then applied to set aside service of the proceedings and to dismiss Mr. Jones’s claim on the ground of state immunity under the State Immunity Act 1978. On that ground, on 30 July

7 http://www.publications.parliament.uk
2003, Master Whitaker set aside service of the proceedings and refused permission to serve Colonel Abdul Aziz by an alternative method. With the master’s permission, Mr. Jones appealed to the Court of Appeal, contending that Part 1 of the 1978 Act was incompatible with article 6(1)(the right to access court hence a right to a fair trial) of the European Convention on Human Rights.

Messrs Mitchell, Sampson and Walker are the claimants in the second action giving rise to this appeal. They issued High Court proceedings on 12 February 2004 against four defendants. The first two defendants were sued as officers in the Kingdom’s police force. The third defendant was sued as a colonel in the Ministry of Interior of the Kingdom and deputy governor of a prison in which the claimants were confined. The fourth defendant was sued as head of the Ministry of Interior. They claimed aggravated damages for assault and negligence, contending that they had been subjected to torture by the first two defendants, which the third and fourth defendants had caused or permitted or negligently failed to prevent. On 18 February 2004 Master Whitaker refused the claimants’ ex parte application to serve the proceedings out of the jurisdiction on the ground of state immunity under the 1978 Act. With the master’s permission, the claimants appealed to the Court of Appeal.

The Court of Appeal dismissed Mr. Jones’s appeal against the dismissal of all his claims against the Kingdom, including his claim based on torture (but not including his claim in false imprisonment, which he had abandoned). But it allowed Mr. Jones’s appeal against refusal of permission to serve Colonel Abdul Aziz out of the jurisdiction by an alternative method, and it allowed
the appeal of the three claimants in the second action against the refusal of permission to serve all four defendants out of the jurisdiction (save in respect of the claimants’ allegations of negligence). The applications for permission to serve out of the jurisdiction in both actions were remitted to Master Whitaker for him to consider whether, in the exercise of his discretion, to grant permission to serve out. Mr. Jones, the Kingdom and the claimants in the second action have all appealed against those parts of the Court of Appeal’s orders which were adverse to them, save that none of the claimants has challenged the dismissal of his claims not based on torture.

The House of Lords in a unanimous decision reversed the decision of the Court of Appeal in respect of the six defendants- state agents- deciding that they were entitled to immunity ratione materiae from the jurisdiction of the English courts. The leading judgments were delivered by Lord Bingham and Lord Hoffmann. The court conceded that the SIA did not expressly provide for cases where a suit is brought against state agents, but concluded that they were nevertheless entitled to ‘foreign state protection under the same cloak as the state protects itself’. The acts of the individual defendants in both actions were in fact sovereign in nature, irrespective of their illegality under international law.8

Lord Hoffmann criticised Mance LJ's conclusion that a discretionary approach to immunity was more appropriate than a ‘blanket’ denial of jurisdiction. Lord Hoffmann remarked that this represented a misconception

---


30 Sydney L. R. 551. at 559-560 (2008)
of the nature of state immunity, which was not imposed at the discretion of the domestic court, but imposed from the outside by international law. That is, the foreign state either has the right to claim immunity or not, and the decision is not down to the discretion of the domestic court. This perhaps misunderstands Mance LJ’s argument that the discretion exists in the domestic court because there is no right to immunity ratione materiae for torture. The court would exercise discretion pursuant to the doctrine of forum non conveniens, not state immunity.

Lord Bingham observed in Jones that:

A state can only act through its servants and agents; their official acts are the acts of the state; and the state’s immunity in respect of them is fundamental to the principle of state immunity. It is no doubt true that the availability of immunity ratione materiae to state agents is crucial, for a state functions through them, yet only the highest ranking officials attract the protection of immunity ratione personae.\(^9\)

6. Discussion of the Cases

The cases discussed above mark the evolution of international law in terms of head of state and their state officials’ immunity. Even though a bold step was commenced by the House of Lords in the Pinochet case by not granting the former head of state of Chile immunity for acts that violate international human rights law and international humanitarian law during his term in office and condemning those acts and striving to hold accountable any individual no

\(^9\) Id. at 560
matter what his position is. This was definitely rebirth of international criminal law. Yet, as we compare this courageous decision we find that the House of Lords itself in the case of Al Adsani which was prior to the Pinochet case, we find that immunity was granted to the Government of Kuwait and this principle was concurred in the Jones case that granted the incumbent head of state of Saudi Arabia and beyond them their the heads of government and state officials immunity for acts that violate international law. The situation became hazy when the ICJ made its decision in the Arrest Warrant case by broadening the scope and granting the incumbent Minister for Foreign Affairs of Congo- who was no longer in his position when the Congo filed the case- immunity for acts that violate international humanitarian law during his term in office. Thus, a question could be raised as to reason behind these decisions. Firstly, it’s apparent that the latter cases are against incumbent heads of states or their officials. Secondly, the similarity lies in the grave breaches of international humanitarian law committed by these officials. Thirdly, the raison d’être behind immunity is to facilitate the functions of these officials especially when travelling abroad so that they can carry out their functions effectively. This leads us to fourthly, sovereignty and equality of states and their officials as to the jurisdiction of foreign courts to try such cases. This point contradicts the principle of universal jurisdiction- incorporated in domestic laws of countries such as Belgium- which calls for prosecution of serious crimes irrespective of the place where the act was committed or nationality of the person who committed the act.
I conclude by emphasizing the fact that before head of states and their officials ask for their rights to immunity they should respect and implement their duty to uphold human rights under the UN Charter by allowing domestic courts to try such officials who break the law and hence ensuring the sovereignty and equality of states officials. Immunity should not be an easy mean for impunity. My understanding is that the real reason behind the courts decisions in the latter cases is that those cases were against incumbent heads of state not former heads of state like in the Pinochet case and therefore the decisions were highly influenced by political relations among states rather than the technical aspects of the law. This was clearly reflected in the Arrest warrant case when a former Minister of Foreign Affairs at the time of proceedings was granted immunity for acts in violation of the IHL -since the arrest warrant was issued in the period when he was still in office-, all this to preserve the sovereignty of the Congo regardless that Mr. Abdulaye Yerodia Ndombasi doesn’t enjoy functional immunity anymore. Therefore there are a lot of strings attached as to sovereignty and equality of states and also the stability of the state itself if its head of state is extradited for the purposes of trial. Thus, this glares a gap in international law today as to the position of states if their head of state is detained, what is the position of the state and how do we balance international law obligations on states in regards to trying international human rights and international humanitarian law violators and also sustaining the sovereignty and stability of the state.
7. Conclusion

I conclude by stating that the quest to prosecute international law violators’ in particular incumbent head of states and their officials is unsettled yet. Precedents have settled the debate of former heads of states by denying them immunity. One should remember that the principle is the jurisdiction of courts to prosecute the exception however is immunity granted to head of states that prevents their prosecution. Hence, there should be a balance between upholding human rights and humanitarian law and the prosecution of offenders who have immunity.
CHAPTER THREE
INTERNATIONAL CRIMINAL TRIBUNALS

1. Introduction

This chapter will discuss the international criminal tribunals namely the International Military Tribunal “IMT” at Nuremburg and the Far East (also known as IMT at Tokyo), The International Criminal Tribunal for Former Yugoslavia “ICTY”, International Criminal Tribunal for Rwanda “ICTR and the International Criminal Court “ICC”.

2. The Development of the Prosecution of International Crimes

Prosecutions for war crimes used to be conducted by national courts, and these were and still remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases.  

One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other

---

1 William A. Schabas. An Introduction to the International Criminal Court, at 1-3 (2nd Edition 2004)
humanitarian norms. But Gustav Monnier's innovative proposal was much too radical for its time.²

The Hague conventions of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty. They include important series of provisions dealing with the protection of civilian populations. Article 46 of the Regulations that is annexed to the Hague Convention IV of 1907 enshrines the respect of “[f]amily Honor and rights, the lives of persons, and private property, as well as religious convictions and practice.”³

The Hague conventions, as international treaties, were meant to impose obligations and duties upon states, and were not intended to create criminal liability for individuals. They declared certain acts to be illegal, but not criminal, as can be seen from the absence of anything suggesting a sanction for their violation. Within only a few years, The Hague Conventions were being presented as a source of the law of war crimes.⁴

Actual prosecution for violations of the Hague conventions would have to wait until Nuremberg. Offences against the laws and customs of war, known as 'Hague Law' because of their roots in the 1899 and 1907 conventions, are codified in the 1993 Statute of the International Criminal Tribunal for the

² Id. at 2

³ Convention Concerning the Law and Customs of War on Land (Hague IV), 3 cited in Id. at 2

⁴ Id. at 2
Former Yugoslavia and in article 8(2) (b), (e) and (f) of the Statute of the International Criminal Court. 5

3. The International Military Tribunal at Nuremberg and the Far East

(i) Introduction

During the Second World War, millions of Jews and other selected civilians were systematically exterminated and otherwise subjected to abuse. After that War, the Allied victors established international war crimes tribunals in Nuremberg in Germany and Tokyo in Japan to hold trials of high level Nazis and Japanese accused of committing crimes against peace, crimes against humanity, and war crimes. The indictment for the Nuremberg Tribunal gave no mention of gender crimes, whereas the indictment for the Tokyo Tribunal did mention rape in conjunction with other crimes, such as murder, torture, rape, and looting of a village. The Judgments, as would be expected in the context of the Holocaust, focused on crimes against peace and on mass atrocities committed against innocent civilians in concentration camps in Europe and in vanquished towns across Asia.

(ii) The International Military Tribunal at Nuremberg

Towards the end of World War Two, the British, American, Soviet and French Governments met at London. This conference produced the London Agreement on 8 August 1945. The UK, USA, USSR and France signed this agreement, which was supplemented by Law No. 10 issued by the Allied Control Council in Germany. These instruments were responsible for the

5 Id. at 3
establishment of the institutions and methods used for the trying of international war criminals. The Governing document produced by these meetings was the Charter of the International Military Tribunal.\(^6\)

The International Military Tribunal was governed by its charter which is composed of 30 articles. Article 7 stated that “The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

This charter also stipulated individual responsibility in article 8 which stated that, “The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.”

This tribunal would try suspects whose acts were across national boundaries. Those suspects whose acts were localised, would be tried by each of the four nations own war crime courts. The courts operated by the individual countries operated according to the procedures of the particular country.\(^7\)

(a) The Counts and Charges

In October 1945, indictments were served on twenty four Nazi leaders, and their trial – known as the Trial of the Major War Criminals – began the

\(^6\) Stephen's Study Room: British Military & Criminal History in the period 1900 to 1999. www.stephenstratford.co.uk

\(^7\) Id. at www.stephenstratford.co.uk
following month. It concluded nearly a year later, with the conviction of nineteen defendants and the imposition of sentence of death in twelve cases.

The four counts which were specified by the IMT charter's Article 6 are:

1. The conspiracy to wage aggressive war. This count alleged that there was a general conspiracy among a group of people to plan, organise and otherwise prepare for an aggressive war.

2. The actual waging of aggressive war. This count dealt with the actual carrying out of an aggressive war, including the breaking of treaties, agreements and other international items.

3. War Crimes. This count dealt with acts against the laws and usage of war. An example of this would be the killing of prisoners-of-war.

4. Crimes against humanity. This count dealt with the acts committed against specific groups of people, based on their, for example, religion.

The defendants were then charged with committing crimes covered by one of the counts. As required by the charter, they were issued with copies of the indictments and supporting documents in German.8

The charter of the international Military tribunal had been adopted after the crimes had been committed, and for this reason it was attacked as constituting ex post facto criminalization. Rejecting such arguments, the tribunal referred to the Hague conventions, for the war crimes, and to the 1928 Kellogg-Briand pact, for crimes against peace. It also answered that the prohibition of

8 Id. at www.stephenstratford.co.uk.
retroactive crimes was a principle of justice, and that it would fly in the face of justice to leave the Nazi crimes unpunished. This argument was particularly important with respect to the category of crimes against humanity, for which there was little real precedent. In the case of some war crimes charges, the tribunal refused to convict after hearing evidence of similar behavior by British and American soldiers.9

Briefly before they started their deliberations, the judges discussed the method of capital punishment to be used. The French judges suggested that a firing squad should be used for the military condemned. The Russian Judge, Major-General Nikitchenko fiercely opposed this idea. The accused were common criminals who had disgraced their military ethos and tradition. The judges voted that all those sentenced to death would be hanged.10

The death sentences were carried out inside the Nuremberg Prison Gymnasium where a set of three gallows had been placed. The condemned were hanged in the order of their indictment.11

(ii) The International Military Tribunal for the Far East (IMTFE)

In the Pacific Theater, the victorious Allies established the international Military Tribunal for the Far East on May 3, 1946 to November 12, 1948. The Charter of the IMTFE is composed of 17 articles. All Japanese Class A war criminals were tried by the IMTF in Tokyo. Japanese war criminals were

---

9 Id. at www.stephenstratford.co.uk
10 Id. at www.stephenstratford.co.uk
11 Id. at www.stephenstratford.co.uk
tried under similar provisions to those used at Nuremberg. The bench was more cosmopolitan, consisting of judges from eleven countries, Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States of America. The Tokyo trial lasted two and a half years, from May 1946 to November 1948. Other war criminals were tried in the respective victim countries. War crime trials were held at ten different locations in China. The Nuremberg Judges were appointed by the four major powers, the United States, the United Kingdom, France and the Soviet Union. 12

Of the eighty 80 Class A war criminal suspects detained in the Sugamo prison after 1945, twenty-eight men were brought to trial before the IMTFE. The accused included nine civilians and nineteen professional military men. 13

Joseph Keenan, the chief prosecutor representing the United States at the trial, issued a press statement along with the indictment: “war and treaty-breakers should be stripped of the glamour of national heroes and exposed as what they really are --- plain, ordinary murderers.”14

(a) Jurisdiction of the International Military Tribunal of the Far East

Article 5 of the IMTFE stated that:

Jurisdiction over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals

12 Id. at www.cnd.org
13 Id. at www.cnd.org
14 Id. at www.cnd.org
or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace*: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *Conventional War Crimes*: Namely, violations of the laws or customs of war;

(c) *Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Individual responsibility was incorporated in article 6 which stated:
Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Two (Yosuke Matsuoka and Osami Nagano) of the twenty-eight defendants died of natural causes during the trial. One defendant (Shumei Okawa) had a mental breakdown on the first day of trial, was sent to a psychiatric ward and was released in 1948 a free man. The remaining twenty-five were all found guilty, many of multiple counts. Seven were sentenced to death by hanging, sixteen to life imprisonment, and two to lesser terms. All seven sentenced to death were found to be guilty of inciting or otherwise implicated in mass-scale atrocities, among other counts. Three of the sixteen sentenced to life imprisonment died between 1949 and 1950 in prison. The remaining thirteen were paroled between 1954 and 1956, less than eight years in prison for their crimes against millions of people. Two former ambassadors were sentenced to seven and twenty years in prison. One died two years later in prison. The other one was paroled in 1950, and was appointed foreign minister in 1954. 

\[15\]

\[15\] Id. at www.cnd.org
4. The *Ad Hoc* Tribunals: The International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR)

While the draft statute of an international criminal court was being considered in the international law commission, events compelled the creation of a court on an *ad hoc* basis in order to address the atrocities being committed in the Former Yugoslavia and Rwanda.

The Yugoslav and Rwandan tribunals are in effect joined at the hip, sharing not only virtually identical statutes but also some of their institutions. The first major judgment by the Appeals Chamber of the Yugoslav Tribunal, the *Tadic*¹⁶ jurisdictional decision of 2 October 1995, clarified important legal issues relating to the creation of the body. It also pointed the tribunal towards an innovative and progressive view of war crimes law, going well beyond the Nuremberg precedents by declaring that crimes against humanity could be committed in peacetime and by establishing the punishability of war crimes during internal armed conflicts.¹⁷

(i) The International Criminal Tribunal for Former Yugoslavia (ICTY)

Established as an *ad hoc* court the ICTY was created in virtue of resolution 827 of the Security Council of the United Nations. It is located in The Hague, Netherlands. This resolution was adopted on the 25th of May 1993, as a

---

¹⁶ Prosecution V. Tadic (Case No. IT-94-1-AR72) (1997) 105 ILR 453 cited in William A. Schabas supra note 1 at 12

¹⁷ William A. Schabas, *Id.* at 12
reaction to the threat to peace and international security that grave violations of the humanitarian laws in the territory of Croatia and Bosnia and Herzegovina in former Yugoslavia since 1991 represented. Reports depicting horrendous crimes, in which thousands of civilians were being killed and wounded, tortured and sexually abused in detention camps and hundreds of thousands expelled from their homes.  

The ICTY was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. It was established by the Security Council in accordance with Chapter VII of the UN Charter.

The Statute of ICTY consists of 34 articles. Article 7 (2) titled ‘Individual Criminal Responsibility’ states that; “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

Jurisdictions of the ICTY, in accordance with the resolution, have multiple objectives. The main goals are: to try those individuals most responsible for appalling acts such as crimes against humanity- murder, torture, rape, enslavement, destruction of property- genocide, violation of laws or customs of war. Grave breaches of the Geneva Conventions of 1949 as listed in the Tribunal's Statute from articles 2 to 5 and also to uphold justice for the

---

18 www.icty.org
19 www.icty.org
victims, and to hinder revisionism by seeking and imposing the judiciary truth, and to help build back peace and reconciliation in former Yugoslavia. 20

The ICTY has charged over 160 persons, including head of state Slobodan Milošević. The proceedings against Slobodan Milosević were terminated due to his death before transfer to the Tribunal. Also prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts were indicted. Its indictments address crimes committed from 1991 to 2001 against members of various ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia. More than 60 individuals have been convicted and currently more than 40 people are in different stages of proceedings before the Tribunal. While operating at full capacity, the Tribunal is working towards the completion of its mandate. The ICTY aims to achieve this by concentrating on the prosecution and trial of the most senior leaders, while referring a certain number of cases involving intermediate and lower-ranking accused persons to national courts in the former Yugoslavia. This plan, commonly referred to as the Tribunal's 'completion strategy', foresees the Tribunal assisting in strengthening the capacity of national courts in the region to handle war crimes cases. The ICTY is made up of three main branches: the Chambers, the Registry, and the Office of the Prosecutor.21
(ii) The International Criminal Tribunals for Rwanda (ICTR)

Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council expressed it’s 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda' and hence created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8, November 1994. The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The International Criminal Tribunal for Rwanda was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide- against the Tutsi group which was perpetrated by the Hutu- and other such violations of international law committed in the territory of neighbouring States during the same period.22

The International Criminal Tribunal for Rwanda is governed by its Statute, which is annexed to Security Council Resolution 955. ICTR statute consists of 32 articles and it closely resembles that of the ICTY, although the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal armed conflict. Article 6(2) titled ‘Individual Criminal Responsibility’ states that, “The official position of any

22 www.ictr.org
accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

The Rules of Procedure and Evidence, which the Judges adopted in accordance with Article 14 of the Statute, establish the necessary framework for the functioning of the judicial system. The Tribunal consists of three organs: the Chambers and the Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; and the Registry, responsible for providing overall judicial and administrative support to the Chambers and the Prosecutor.  

By resolution 977 of 22 February 1995, the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania, whereas the Appeals Chamber is located in The Hague (Netherlands). The first indictments were issued in November 1995 following the election of the first judges.  

In accordance with its “Completion Strategies”, as defined in Resolutions 1504 and 1534 of the UN Security Council, the Tribunal had concluded all its investigations by the end of 2004 and all of the trials at first instance should have been completed by the end of 2008 and what’s left of the work should

---

23 www.ictr.org

24 www.ictr.org
be completed now in 2010. This must be done, even if any of the main suspects have still not been arrested.25

(a) Jurisdiction

- **Ratione Materiae**: genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II shall be punishable;

- **Ratione Temporis**: crimes committed between 1 January and 31 December 1994;

- **Ratione Personae et Ratione Loci**: crimes committed by Rwandans in the territory of Rwanda and in the territory of neighboring states, as well as non-Rwandan citizens for crimes committed in Rwanda.

5. The International Criminal Court (ICC)

(i) Introduction

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. 26

The International Criminal Court is an independent international organisation, and is not part of the United Nations system. Its seat is at The

25 [www.ictr.org](http://www.ictr.org)

26 [www.icc-cpi.int](http://www.icc-cpi.int)
Hague in the Netherlands. Although the Court’s expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities.27

(ii) Drafting of the ICC Statute

In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the International Law Commission's (ILC) draft statute as a basis. It convened an Ad Hoc Committee, which met twice in 1995. The Ad Hoc Committee concluded that the new court was to conform to principles and rules that would ensure the highest standards of justice, and that these should be incorporated in the statute itself rather than being left to the uncertainty of judicial discretion.28

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome, at the headquarters of the Food and Agriculture Organization (FAO). More than 160 states sent delegates to the conference, in addition to a range of international organizations and literally hundreds of non-governmental organizations.29

---

27 www.icc-cpi.int

28 William A. Schabas, supra note 70 at 13-15-17-18-19 and 20

29 Id. at
The United States tried unsuccessfully to rally opposition, convening a meeting of what it had assessed as waivers'. Indeed hopes that the draft statute might be adopted by consensus at the final session were dashed when the United States exercised its right to demand that a vote be taken. The result was 120 in favour, with twenty one abstentions and seven votes against. The vote was not taken by roll call, and only the declarations made by States themselves indicate who voted for what. The seven countries that voted against the treaty were China, Iraq, Israel, Libya, Qatar, the United States, and Yemen. Among the abstainers were several Arab and Islamic states, as well as a number of delegations from the Commonwealth Caribbean.\textsuperscript{30}

The magic number of sixty ratifications was reached on 11 April 2002. The Rome Statute which consists of 128 articles entered into force on the 1\textsuperscript{st}, July 2002. The court cannot prosecute crimes committed prior to entry into force.\textsuperscript{31}

Today, 110 countries have joined the court, including nearly all of Europe and South America, and roughly half the countries in Africa. However, these countries only account for a minority of the world's population. A further 38 states have signed but not ratified the Rome Statute; article 18 (a) of the Vienna Convention on the Law of Treaties (1969)-VCLT- obliges these states to refrain from “acts which would defeat the object and purpose” of the treaty.\textsuperscript{32}

\textsuperscript{30} Id. at
\textsuperscript{31} Id. at
\textsuperscript{32} www.icc-cpi.int
(iii) Crimes within the Jurisdiction of the Court

Article 5 of the Rome Statute 1998 grants the Court jurisdiction over four groups of crimes, which it refers to as the “most serious crimes of concern to the international community as a whole”: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The statute defines each of these crimes except for aggression: it provides that the court will not exercise its jurisdiction over the crime of aggression until such time as the states parties agree on a definition of the crime and set out the conditions under which it may be prosecuted.

(iv) Exercise of Jurisdiction

According to article 13 of the Rome Statute, exercise of jurisdiction is limited to the following circumstances:

- where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the court);

- where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court); or

- where a situation is referred to the court by the UN Security Council.
(v) Issues of Admissibility

The ICC is intended as a court of last resort, investigating and prosecuting only where national courts have failed. Article 17 of the Statute provides that a case is inadmissible if:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

Article 20, paragraph 3, specifies that, if a person has already been tried by another court, the ICC cannot try them again for the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

(vi) Co-operation by States not Party to Rome Statute

One of the principles of international law is that a treaty does not create either obligations or rights for third States *pacta tertiiis nec nocent nec prosunt* without their consent, and this is also enshrined in the 1969 Vienna Convention on the Law of Treaties. The co-operation of the non-party States with the ICC has been stated in article 87 that comprises seven paragraphs. However, even States that have not acceded to the Rome Statute might still be subject to an obligation to co-operate with ICC in certain cases. When a case is referred to the ICC by the UN Security Council all UN member States are obliged to co-operate, since its decisions are binding for all of them. Also, there is an obligation to respect and ensure respect for international humanitarian law (IHL), which stems from the Geneva Conventions and Additional Protocol I, which reflects the absolute nature of IHL. Although the wording of the Conventions might not be precise as to what steps have to be taken, it has been argued that it at least requires non-party States to make an effort not to block actions of ICC in response to serious violations of those Conventions. In relation to co-operation in investigation and evidence
gathering, it is implied from the Rome Statute that the consent of a non-party State is a prerequisite for ICC Prosecutor to conduct an investigation within its territory, and it seems that it is even more necessary for him to observe any reasonable conditions raised by that State, since such restrictions exist for States party to the Statute. As for the actions that ICC can take towards non-party States that do not co-operate, the Rome Statute stipulates that the Court may inform the Assembly of States Parties or Security Council, when the matter was referred by it, when non-party state refuses to co-operate after it has entered into an *ad hoc* arrangement or an agreement with the court.33

(vii) The Scope of Head of State Immunity According to the Rome Statute

The basis of responsibility stipulated by the Rome Statute is individual responsibility as stated in article 25(1) and (2):

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

Hence it becomes quite obvious to lift immunity from any person who enjoys it as stated in article 27 of the Statute titled ‘Irrelevance of official capacity’:  

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

33 [www.wikipedia.org](http://www.wikipedia.org)
a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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

There is an important practical exception, however, that can serve to shield certain classes of persons from prosecution. The court is prohibited pursuant to article 98 (1), from proceeding with a request for surrender of assistance if this would require a requested state to act inconsistently with its obligations under international law as concerns a third state, unless the latter consents. Diplomatic immunity falls into such a category. This means that, while a state party to the statute cannot shelter its own head of state or foreign minister from prosecution by the ICC, the court cannot request the state to cooperate in surrender or otherwise with respect to a third state. Nothing prevents the State party from doing this if it so wishes, and once the head of state was taken into the actual custody of the court he or she would be treated like any other defendant. Similarly, the court is also prohibited from proceeding in a request for surrender that would require a state party to act
inconsistently with certain international agreements reached with a third state. 34

The provision – article 98 (2) – was intended to ensure that a rather common class of treaties known as 'status of forces agreements' (or SOFAS) would not be undermined or neutralized by the statute. SOFAs are used to ensure that peacekeeping forces or troops based in a foreign country are not subject to the jurisdiction of that country's courts. Some ingenious lawyers in the United States Department of State have attempted to pervert article 98 (2), drafting treaties that shelter all American nationals from the Court. Several States parties have succumbed to Washington's pressure and agreed to such arrangements. 35

It is however unclear to what extent the ICC is compatible with reconciliation processes that grant amnesty to human rights abusers. Article 16 of the Rome Statute allows the Security Council to prevent the court from investigating or prosecuting a case, and Article 53 allows the Prosecutor the discretion not to initiate an investigation if he or she believes that “an investigation would not serve the interests of justice”. Former ICC President Philippe Kirsch has said that "some limited amnesties may be compatible" with a country's obligations genuinely to investigate or prosecute under the statute. 36

It is sometimes argued that immunity is necessary to allow the peaceful transfer of power from abusive regimes. By denying States the right to offer

---

34 William A. Schabas, supra note 70 at 80-81

35 Id. at 81

immunity to human rights abusers, the International Criminal Court may make it more difficult to negotiate an end to conflict and a transition to democracy. However, the United Nations and the International Committee of the Red Cross maintain that granting immunity to those accused of war crimes and other serious crimes is a violation of international law.\textsuperscript{37} 

6. Conclusion

It took the international community a long period of time to establish a permanent criminal court. Hence, in order to reduce the level of impunity from prosecution until the establishment of a permanent criminal court the IMT and the two ad hoc tribunals were established. It is apparent that all these international criminal tribunals paved the way for the further development of international criminal law by compelling individual responsibility. The difference though is that all the previous tribunals had limited jurisdiction to prosecute cases that are within their mandate. On the other hand the ICC has jurisdiction not only to lift immunity from head of states and their state officials -like the rest- but also to bind States which are not parties to the Rome Statute through the Security Council to the jurisdiction of the Court. Here is where the controversy occurs between the Rome Statute and the principles of international law and in particular the Vienna Convention on the Law of Treaties (1969) that clearly stipulates that a treaty does not create either obligations or rights for third States \textit{pacta tertiiis nec nocent nec prosunt}. This controversy creates a dispute of whether

\textsuperscript{37} \url{www.wikipedia.org}
such clause may render the ICC jurisdiction inadmissible and hence void or that such clause represents an evolution in international law by repealing the clause from the VCLT. Even though the jurisdiction of the ICC commences when the State where the violations occurred is unable or unwilling to take action in terms of prosecution of the violators; the purpose for this is to achieve justice for the victims and to eliminate impunity and to stress on the concept of restrictive sovereignty. This concept that has been worn out by the establishment of the United Nations and the clear indication made in its charter to uphold human rights and to ensure international peace and security which is no longer the sole task of the State in question. Yet, this noble initiative made by the ICC might be ineffective in the sense that in cases of heads of state who are not parties to the statute by issuing an arrest warrant and without actual mechanisms of arrest except for the cooperation of parties to the statute and the universal community enshrined in the UN. Assuming those attempts are successful, a question imposes itself: What is the fate of the forum in the sense of security and order?
CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

Head of state immunity is a principle that experienced rapid growth in the past centuries. It was first integrated with the principle of state immunity since the head of state was regarded as the mouth and hands of the state in metaphorically. But actually the head of state symbolizes the sovereignty of the state among other states. Hence, his enjoyment of immunity would come naturally since the state enjoys immunity. The principle of absolute state immunity was reigning until the 19th century when the restrictive immunity was introduced due to commercial transactions practiced by states. It was not until the second half of the 20th century that states were fully aware that they could be under jurisdiction of another state. States regarded immunity as a shield from adjudication from foreign courts and to ensure the sovereignty and equality of states.

The source of head of state immunity is customary international law. No treaty has been enacted on this principle. Although the FSIA and SIA enacted by the US and UK respectively, which adopted the restrictive state immunity approach, stated that the heads of state enjoyed immunity but the matter was not fully discussed. The US leaves the matter up to the executive authority when there is a law suit pending in court to evaluate the situation and decide whether the defendant is regarded as head of state or not. As for civil law countries they depend on case law for this matter and for the state immunity.
Thus, since both common law and civil law countries rely on customary international law to set principles that are binding on states in regard to head of state immunity and this is accomplished through case law and state activity on this matter.

The raison d’être for head of state immunity is to ensure that heads of states are not inhibited in performing their diplomatic functions, by being arrested during their official visits which serves the traditional aims of sovereign immunity, because subjecting a state's leader to the jurisdiction of a foreign court infringes to some degree on that state's sovereignty.

In the dawn of a new era after the atrocities of the Second World War, it was necessary to stand back and readdress the situation of impunity in regard to international crimes that have been committed by high commander officers and other high ranks in the government. It was not until the establishment of the IMT at Nuremburg on 8, August 1945 by the victorious Allies for the prosecution of the Nazis responsible for the violation of the international humanitarian law “Hague Law” took place. Perhaps one of the ground breaking principle that this Tribunal introduced was the ‘individual responsibility’ article that clearly condemned acts and imposed liability on ‘head of states’ and other state officials. The only set back was that this article that was also included in the IMTFE, ICTY and ICTR applied only to the jurisdiction stated in their statutes which was mostly territorial.

With these developments and the birth of a new branch of international law which is ‘international criminal law’ that upholds individual responsibility the position of immunity of heads of state became threatened. Recent case
law has differentiated the position of former and current heads of state. The *Pinochet case* marks a bold move by the House of Lords that lifted immunity from the former Chilean head of state for crimes against humanity that were committed during his tenure of office which he was knowingly responsible. The Law Lords believed that crimes against humanity are condemned by international law and are not regarded as acts which fall within the acts that acquire heads of states immunity. Also since the former heads of state do not enjoy this position anymore, exposing them to prosecution would not defeat the raison d’être of their functional immunity and their personal immunity that seized to exist once they ended their tenure of office.

The position of the current head of state remains unsettled. It would seem that the initiative made by the House of Lords in regards to crimes against humanity and other international crimes condemned by the Geneva Convention IV, 1949 and hence by international law, and the obligation stated in the UN Charter to uphold human rights did not alter the position of the ICJ or the other House of Lords decisions on this matter. It seems that the courts vague position on the matter is highly influenced by the political relations between states rather than carrying out their actual functions as courts and that is to uphold justice under any costs and to remedy the victims. With the development of the ICC and the straight forward article 27 of the Rome Statute stated that “official capacity as a Head of State or Government… shall in no case exempt a person from criminal responsibility under this Statute” the issue of lifting immunity from heads of states should be settled.
This time around the long awaited permanent international criminal court has jurisdiction not only on parties to the treaty but also on cases referred to it by the UN Security Council. It is this latter point that creates a feud between settled principles of international law embodied in the Vienna Convention on Law of Treaties that clearly stipulates that a treaty does not create either obligations or rights for third States (*pacta tertiis nec nocent nec prosunt*). Regardless of the purpose of the International Criminal Court to eliminate impunity in respect of international crimes, the task of forcing states to be bound by a statute of a court that they have not ratified through the Security Council which the states are members of seems quite a crucial transition in international law in the field of international criminal law. One might interpret the jurisdiction of UN Security Council to refer cases to the International Criminal Court under Chapter VII of the UN Charter as an exception to the Vienna Convention on Law of Treaties article.

The miraculous development of the arrest warrant issued by the International Criminal Court against the Sudanese President Omar Al-Bashir on 4\(^{th}\) March 2009 for war crimes and crimes against humanity allegedly committed in Darfur region in Western Sudan when the matter was referred by the Security Council to the ICC (even though the Sudan is not a party state to the Rome Statute). This will probably answer both questions which were raised in this research. The first question: the situation of current heads of state accused of international crimes and the second question as to whether the principle of binding non state parties to the Rome Statute will defeat the principle of *pacta tertiis nec nocent nec prosunt* incorporated in the Vienna Convention.
on Law of Treaties? International law went a long way from state responsibility and arrived to very slippery grounds of individual responsibility in respect of heads of state.

In light of the above findings, the following recommendations may be made

1. To enact a treaty which focuses on head of state immunity.

2. To realize the criticalness of lifting immunity from head of states in cases of international crimes in the sense that there should be a great deal of consideration as to the settlement and security of the forum that will suffer the removal of its head of state. I suggest that prevention measures should be applied in this situation before issuing an arrest warrant by a specialized team of hybrid experts formed by the UN to ensure neutrality in the matter and with representatives from both the ICC and the State in question in order to facilitate the task of the experts which is to ascertain beyond reasonable doubt that the allegations against the head of state are admissible.

3. The issue of *pacta tertiis nec nocent nec prosunt* incorporated in the VCLT and the ICC’s jurisdiction on non state parties should be settled through an active effort by the UN.

4. Efforts should be made by the international community to improve judiciaries and legal systems as a whole so that they can become able to try cases that involve violations of international human rights law and international humanitarian law.
A. BOOKS


B. ARTICLES


C. ELECTRONIC DATA


http://www.publications.parliament.uk. Official website of the UK Parliament


www.cnd.org

www.icc-cpi.int. Official website of the International Criminal Court


www.stephen-stratford.co.uk- Stephen's Study Room: British Military & Criminal History in the period 1900 to 1999.

www.wikipedia.org