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IMMUNITY OF HEADS OF STATE FOR INTERNATIONAL CRIMES: DEFLATING DICTATORS' LIFEBELT?

Absolute immunity of Heads of States in a forum other of their own jurisdiction, once firmly established under customary international law, has been repeatedly challenged after the Second World War. The article examines developments in international law and narrowing of the Head of State immunity through statutes and practice of international criminal tribunals, hybrid courts, Rome Statute and other treaties, and to some extent by state practice. The ICJ's Arrest Warrant decision is critically assessed as a step back in a progressive trend of limiting immunity as a defense to states leaders.

A conclusion is submitted, with highlights also on challenges and downsides of such an approach, that only international courts and tribunals may disregard both immunity of serving (personal immunity) and former heads of states (functional immunity), while states should continue to respect personal immunity of foreign officials. On the other stats, states can, but are no longer bound to respect functional immunity of foreign Heads of States in cases of gravest international crimes.

Key words**:** *Immunity of Head of State. – Immunity ratione materiae.– Immunity ratione personae. – International crimes. – Arrest Warrant case.*

Under customary international law, Heads of States are accorded with the immunity from jurisdiction and law enforcement other then of their own states.[1] This rule is grounded on the traditional premise that

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[1] For different types of Heads of State and recognition of the status, see A.Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de la Academie de Droit International de la Haye*, 247/1994, 26,34–35.

state does not adjudicate on the conduct of another state, which streams from various rationales such as equal sovereignty of states, international comity, practical need for unimpeded international intercourse, etc. Immunity afforded to Head of State is the privilege that belongs to the country of origin. It is not an individual right and a protected person cannot waive his/her own immunity; it is only the state that such person represents that can do so.[2] Traditionally, immunity that shields Heads of State while in office has been absolute because it attaches to them as to the persons sitting at the highest sovereign positions that emanate from the state itself; this is immunity *ratione personae* or personal immunity. It is a procedural bar from exercise of a foreign jurisdiction over serving Head of State. Acts of Heads of State undertaken in official capacity during their mandates are covered by another prong of immunity – immunity *ratione materiae* or functional immunity. Under the classical Head of State immunity doctrine, official acts are equated with acts of state, and former Heads of State have enjoyed immunity from prosecution for such acts even after descending the post.[3] Personal immunity is linked to the official post, functional immunity concerns nature of the acts.[4] In practical terms, personal immunity is the first matter to be discussed if an incumbent Head of State is to be brought before a court, whereas functional immunity will come into play when jurisdiction is exercised over a former Head of State.

Head of State immunity has long remained unchallenged, but there have been several turning points in deliberating international law immunity of highest state officials, which have influenced the rules, altered perspectives and opened a plethora of discussions on the matter. This article tends to examine these developments and current trends in international law and touch upon state practice on the issue of immunity of Head of State with respect to core international crimes. Since this type of immunity is not regulated by a single comprehensive instrument, it is necessary to look back at a combination of historical records of development of international norms, jurisprudence of international courts and tribunals, and relevant national case law.

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[2] *Ibid*., 35.

[3] For a similar definition, also I. Brownlie, *Principles of International Law*, Oxford University Press, Oxford 1998[5], 330–334.

[4] On the distinction between personal and functional immunities, see, e.g, R. Jennings and A.Watts (eds), *Oppenheim's International Law, Volume I*, Longman, London 1992[9], 345–346, I.Brownlie, 361–362.

1. DEVELOPMENT OF THE NORMS

1.1. Foundations and breakthrough: international *ad hoc* criminal tribunal

1.1.1. The Nuremberg and Tokyo tribunals

The fundaments to changing the rules and the understanding of the Head of State immunity were laid down with the establishment of the two military tribunals after the Second World War. The Charter of International Military Tribunal (the Nuremberg Tribunal) provided, in its Art. 7, 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."[5] The Nuremberg Tribunal ruled in several of its judgments that the official character of acts committed in violation of international law may not be recognized as a defense.[6] The same principles were restated in the regulation of the Allies' interim administration in Germany (*Allied Control Council Law No. 10*) that also authorized trials to the Nazi war criminals.[7] The Nuremberg Charter did not differentiate between functional immunity and personal immunity. The Charter of the Tokyo Military Tribunal did not explicitly refer to Heads of State or Governments, but it also implied that the official capacity could not be a defense for the accused.[8] Since in none of the trials in Nuremberg, post-war Europe, or in the Far East a foreign Head of State was brought before the court, Head of State immunity, in either of these two forms, was not deliberated in the judgments at the time.

The Nuremberg and Tokyo charters opened a door to serious considerations of eroding at that time still firm customary international law norm of immunity of highest state officials. The international law principles as provided in the Nuremberg Charter and expressed in the judgments of the Nuremberg Tribunal were confirmed by a UN General As-

[5] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, August 8, 1945, *58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280*

[6] International Military Tribunal (Nuremberg) Judgement and Sentences, reprinted in L. Henkin *et al*, *International Law: Cases and Materials*, West Publishing co, St Paul 1993[3], 383.

[7] Allied Control Council Law No10, art. II, Art 4(a), December 20, 1945, reprinted in *Law Reports on Trials of War Criminals XVI*, UN War Crimes Commission, London 1950.

[8] Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander of for the Allied Powers at Tokyo, January 19, 1946, Article 6, reprinted in *Treaties and Other International Agreements of the United States of America* Vol. 4, Washington 1946.

sembly resolution unanimously adopted in 1946.[9] The International Law Commission (ILC) also adopted, in 1950, the principles set by the Nuremberg Tribunal, affirming that persons who acted as Heads of State are not exempted from criminal responsibility.[10] The ILC stated that it merely formulated and listed the Nuremberg principles whose existence in international law had already been recognized.[11]

1.1.2. International criminal tribunals for the former Yugoslavia and Rwanda

Accountability of Heads of States resurfaced again in the 1990s, in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR), which contain identical provisions pertaining to irrelevance of official immunity. They read: "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".[12]

Slobodan Milošević was the first serving Head of State to be indicted and then tried by a court other then that of his own state.[13] By rejecting Milošević's challenge to the Tribunal's jurisdiction that relied on his official status, the ICTY affirmed that Head of State immunity did not shield from prosecution by the Tribunal, yet without making any distinction between personal and functional immunity.[14] The ICTY based such a holding on the customary international law foundations of the ICTY Stat-

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[9] Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946, *www1.umn.edu/humanrts/instree/1946a.htm*

[10] Principles of International Law recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal Adopted by the International Law Commission of the United Nations, 1950, Principle III, Report of the International Law Commission, 5 June–29 July 1950, Doc. A/1316, *Yearbook of the International Law Commission Vol II,* 1950.

[11] *Ibid*.,374–380.

[12] Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. *827, U.N. SCOR, 48th Sess, U.N. Doc. S/RES/827*, 1993 (hereinafter ICTY Statute), Article7(2).

Statute of the International Criminal Tribunal for Rwanda, *S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955*, 1994, (hereinafter ICTR Statute) Article 6(2).

[13] ICTY, *Prosecutor v. Slobodan Milosevic*, Case No. IT–02–54, Indictment, para. 43 (24 May 1999) and subsequent amended indictments.

[14] ICTY, *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, (IT–99–37-PT), Trial Chamber (8 November 2001), paras. 28–34. The Trial Chamber referred to Milošević as to "former President" which suggests that it considered his personal immunity stripped when Milošević's descended from the post prior to the commencement of the trial.

ute.[15] The drafting history of the ICTY and ICTR statutes indeed shows that they were meant to reflect the customary international law, including the confirmation of the principle of individual criminal responsibility irrespective of official position as it was set after the Second World War.[16] In a judgment preceding the *Milosevic* case, the ICTY held that the rule of the non-applicability of immunity from the Tribunal's Statute is "indisputably declaratory of customary international law".[17] The both statutes, including their drafting histories, however, neither explicitly make a distinction between functional and personal immunity, nor clearly recognize or deny personal immunity. It may be argued that unless explicitly removed, personal immunity, being well established under customary international law, will remain a defense.[18] Nonetheless, the mere fact that the indictment against Milosevic was preferred and confirmed while he was still in office, testifies about the ICTY's interpretation of its own statute as removing both functional and personal immunities. Furthermore, the reference of the International Court of Justice (ICJ) in the *Arrest Warrant* Judgment, to the ICTY and the ICTR as examples of the possible fora that may exercise jurisdiction over serving state officials, which will be deliberated below, can also attest to such a reading of the Tribunals' statutes.

The Chapter VII origin of the ICTY and the ICTR oblige all the states to co-operate with these tribunals, which may include execution of the tribunals' arrest warrants irrespective of the position of the accused, and leave no space to the states to dissent from the rule that immunity cannot be claimed in relation to their jurisdiction. On the other hand, the statutes of two *ad hoc* tribunals cannot be seen as source of new general rules of international law applicable in situations other than those falling under their jurisdiction. Anything beyond that is rather a matter of influence of these tribunals and their jurisprudence as reflection of customary law, which states may found more or less persuasive.

1. 2. Boundaries of States' will: treaties

1.2.1. Conventions and draft treaties

The 1919 Treaty of Versailles was the first international legal instrument to have set a normative precedent for accountability of a Head

[15] *Ibid*., para 28.

[16] Report of the Secretary General on the Establishment of the ICTY, *UNSG S/25704* (3 May 1993), para. 29, 34–35, 55.

[17] See ICTY, *Prosecutor v. Furundzija*, Case No. ICTY–95–17/1 (10 Dec. 1998), para. 140.

[18] See Z. Deen-Racsmany, "*Prosecutor v. Taylor*: The Status of the Special Court for Sierra Leone and Its Implications for Immunity", *Leiden Journal of International Law*, 18/2005), 315, 319.

of State, but for a very concrete situation. It provided a basis for the prosecution of German Emperor William II after the First World War, but the trial never took place. [19]

Provisions pertaining to Head of State immunity may also be found in several multilateral treaties regulating systematically the matter of the crimes of international concern. The 1948 Genocide Convention, which forms a part of customary law, provides in its Art. 4, that persons who commit genocide "shall be punished whether they are constitutionally responsible rulers, public officials or private individuals".[20] Provisions that suggest accountability of the rulers may also be found in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[21] and in the 1973 Apartheid Convention.[22] The International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, which is intended to bind states in their mutual relations, includes a provision similar to that of the Nuremberg Charter that denies immunity to Head of State.[23]

1.2.2. Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (ICC Statute) is the first multilateral treaty to provide explicitly that Heads of States and Governments shall not be exempted from criminal responsibility if they come under the jurisdiction of the Court for genocide, crimes against humanity, war crimes and the crime of aggression (Article 27 (1)).[24] Arti-

[19] Treaty of the Peace between the Allied and Associated Powers and Germany, June 28, 1919 (Treaty of Versailles), Article 227. Emperor William II found shelter in the Netherlands, which refused to extradite him to face a trial.

[20] Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, *78 U.N.T.S. 277*, Article 4. The customary nature of the Convention's substantive norms was affirmed by the ICJ's Advisory Opinion on Reservations to the Convention on Genocide*, ICJ reports,* 1951, 24.

[21] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. 2 G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968). It applies to "representatives of the State authority and private individuals".

[22] "International criminal responsibility shall apply [...to individuals, members of organizations and institutions and representatives of State]", International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by GA Resolution 3068 (XXVIII) of 30 November1973, Article 3.

[23] Article 11 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of International Law Commission*, Vol. II, Pt.2, 1988, 71.

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

cle 27 further sets forth that "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".[25] These two provisions exclude both immunity *ratione materiae* and immunity *ratione personae* as shields from the Court's jurisdiction, and, as a procedural consequence, the Court does not have to establish what position the accused held at the time of crime or the indictment, since the accused would not be immune from criminal responsibility irrespective of his/her current or former post.[26]

However, Article 27 has to be read in conjunction with another provision of the Rome Statute, Art. 98(1), which provides for the following:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".[27]

Based on this provision, the ICC, which may exercise jurisdiction over nationals and officials of states not parties to the Rome Statute,[28] may not request a state party to arrest or surrender an official of a third state who is protected by immunities afforded by under international law. Likewise, the same provision would prohibit the ICC to stretch its jurisdiction over nationals of non-parties while they are protected by immunities under international law.[29] The Heads of states that are not parties could nevertheless come under the ICC jurisdiction if a case is referred to the Court, in line with Article 13(b) of the Statute, by the UN Security Council acting under Chapter VII of the UN Charter.[30] This interpretation

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national Criminal Court, July 17, 1998, *U.N. Doc. A/Conf.183/9 (1998)* (hereinafter – ICC Statute), Article 27(1).

[25] ICC Statute, Article 27(2).

[26] See P.Gaeta, "Official Capacity and Immunities" in A. Casese, P.Gaeta, J.W.R.D Jones (eds), *The Rome Statute of the International Criminal Court – a commentary, Vol. I*, Oxford University Press, Oxford 2002, 990–991, and O. Triffterer, 'Article 27: Irrelevance of Official capacity', in O. Triffterer (ed), *Commentary to the Rome Statute of the International Criminal Court*, Nomos, Baden-Baden, 1999, 511.

[27] ICC Statute, Article 98(1).

[28] This is if a non-national commits a crime at the territory of a state-party, or if a situation is referred by the UN Security Council, ICC Statute, Article 12(2) and Article 13(b) respectively.

[29] See D. Akande, "International Law Immunities and the International Criminal Court", *American Journal of International Law* 98/2004, 421.

[30] In such a case, the Court is not precluded by nationality of the accused, nor territory where the offence was committed.

was demonstrated when the ICC pre-trial chamber issued an arrest warrant against Omar al-Bashir, the current President of Sudan – state that is not a party to the ICC, following the referral by the UN Security Council.[31] Although the Court was not elaborative in its decision, the waiver of immunity in this case seems to be implicitly streaming from the Security Council's Chapter VII powers, which also implies that state parties have to disregard Al-Bashir's immunity, since otherwise, without co-operation of state parties, the Court is not able to exercise its jurisdiction.[32] Third states, however, may still be bound to respect his immunity, under general international law.[33]

Therefore, only officials of non-parties may benefit from this exemption from the jurisdiction of the ICC – unless the case is referred by the UN Security Council, whereas the state parties cannot be spared from acting upon the Court's request against a Head of State of another ICC party. The provisions of the Rome Statute are waiver by the state parties of any immunity for their officials, including Head of State, in relation to the ICC jurisdiction. This may be considered as indicative of the state parties' preexisting *opinio iuris* that crimes under the ICC Statute should not attract immunity. On the other hand, the State parties are obliged to adhere to Article 27 of the Statute only when a situation involving a former or an incumbent Head of State comes within the jurisdiction of the Court in accordance with the Statute. Outside that scope, the states continue to be bound by other international law norms, and, consequently, the customary law regulation vis-à-vis non-party Head of State remains intact keeping his/her personal immunity in force.

1.3. Variations of state practice: national courts

When the former Chilean President Augusto Pinochet was arrested in the *United Kingdom*, in October 1998, pursuant to a Spanish international arrest warrant containing charges of torture, conspiracy to murder and detention of hostages, this triggered a series of proceedings before

[31] ICC, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, Pre-Trial Chamber I, ICC–02/05–01/09, 4 March 2009, available at *http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf,* last time accessed 25 October 2009. UN Security Council Resolution 1593, 31 March 2005.

[32] See for similar opinion D. Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", *Journal of International Criminal Justice* 7/2009, 341–342. For a different view, which considers that states parties, because of Article 98(1), are not obliged to execute the ICC request for surrender, P. Gaetta, "Does President Al Bashir Enjoy Immunity from Arrest?", *Journal of International Criminal Justice* 7/2009, 324–325, 329.

[33] There are opinions that the immunity would be stripped generally vis-à-vis all the UN members, whereas state not parties to the ICC would not be obliged, but only permitted to arrest Al-Bashir D. Akande, *ibid*., 347–348.

UK courts that many have viewed as transforming the notion and scope of the Head of State immunity doctrine. A first instance UK court initially dismissed the arrest warrants, unanimously upholding Pinochet's claim of immunity as the former Head of State.[34] On appeal, the House of Lords, in its first decision, held by majority two that customary international law provides no basis for immunity from prosecution for international crimes.[35] That was confirmed by another House of Lords' Appellate Committee's decision, allowing for extradition of Pinochet to Spain.[36] It found a ground for denying immunity to Pinoche in the 1984 Torture Convention.[37] The majority held that the immunity of a former Head of State exists only with respect to the acts undertaken in the exercise of the functions of a Head of State, but that in this case immunity cannot be upheld since torture can never constitute an official act of a Head of State.[38] The Law Lords denied immunity to Pinochet only as to the crime of torture, and they relied on their interpretation of the Torture Convention, rather than on customary international law. Therefore, the Law Lords did not come into the situation to take a position whether the immunity of former Heads of States was excluded in all cases of international crimes. However, while denying immunity *ratione materiae* for certain acts committed in official capacity, the both Appellate Committees of the House of Lords agreed that *serving* Heads of State enjoy absolute immunity from suit.[39] The inviolability of personal immunity was affirmed again, in 2004, in a case concerning allegations of torture against President of Zimbabwe, Robert Mugabe, when a British judge upheld his immunity as a sitting Head of State.[40]

The House of Lord's Pinochet decisions was considered a landmark particularly because of their holding that commission of an international crime can never be recognized as an exercise of official function and that immunity for perpetrators of international crimes would be in-

[34] See C. M. Chinkin, "*Regina v. Bow Street Stipendiary Magistrate*, ex Parte Pinochet Ugarte", *American Journal of International Law* 93/1999, 703–704.

[35] *Regina v. Bow St. Metro. Stipendiary Magistrate, ex Parte Pinochet Ugarte*, 4 All E.R. 897 (H.L. 1998) (hereinafter –*Pinochet I*)

[36] The final say on the extradition rested with the UK Home Secretary, and, at the end, Pinoche was not extradited to Spain, but returned to Chile, because of his poor health condition.

[37] C. M. Chinkin, 705.

[38] See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet* [1999] 2 All E.R. 827, 851 (opinion by Lord Hope), 852 (Lord Goff), (H.L. 1998) (hereinafter – *Pinochet III*); also opinions by Lord Browne-Wilkinson and Lord Hutton.

[39] See, for example, *Pinochet I*, 1334 (Lord Nickolls), 1336 (Lord Steyn), and *Pinochet III*, 844 (Lorde Browne-Wilkinson). Also see C.M. Chinkin, 705.

[40] Senior District Judge at Bow Street *Tatchell v. Mugabe*, Judgment of 14 January 2004, reproduced in *International and Comparative Law Quarterly* 53/2004, 769–770.

compatible with objectives of the treaties, such as the Torture Convention, to prevent such crimes. The *Pinochet* case, albeit very significant and praised in the doctrine and among human rights advocates, is nonetheless of a limited legal influence. This was a ruling of a national court, binding only within the national boundaries. It is an added evidence of state practice, but still not able to compel other states to follow its ratio.

In *France*, the Libyan leader Mouammar Ghaddafi was charged for complicity in a terrorist act.[41] In March 2001, the French Court of Cassation concluded that a criminal jurisdiction cannot be exercised over a foreign Head of State in office as it was precluded by customary international law.[42] Although the court was referring to the "Head of State in office", seemingly it found the ground for precluding the prosecution of Ghaddafi in his functional immunity.[43] The French Court, however, by concluding that terrorism is not among the international crimes that entail exception to Head of State immunity apparently extrapolated, *a contrario,* an affirmation that there are international crimes which would remove such immunity.[44]

A *Spanish* court ruled that it did not have criminal jurisdiction over the Cuban leader Fidel Castro, because he was the serving Head of State.[45] The Spanish court also concluded that international law did not require states to provide immunity for former Heads of State, but it did obligate states to recognize immunity to current Heads of State.[46] In a more recent case, the Spanish Court, in response to charges for international crimes, likewise affirmed immunity, based in international law, of Paul Kagame, President of Rwanda.[47]

The *Swiss* Federal Tribunal acknowledged, in the case involving the former Philippine president Marcos, that immunity of a Head of State

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[41] On the details of the case see S. Zappalà, "Do Heads of States in Office Enjoy Immunity from Jurisdiction from International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*", *European Journal of International Law* 12/2001, 595–612.

[42] *Ibid.,*596–597, citing *Arrêt de Cour de Cassation*, 13 March 2001, No.1414, 2.

[43] S. Zappalà, 598 citing *Arrêt de Cour de Cassation,* 2.

[44] *Ibid.,* 600–601 citing *Arrêt de Cour de Cassation,* 3.

[45] "Spain Rules It Has no Jurisdiction to Try Castro", *Agence France-Presse*, 8 March, 1999.

[46] El Auto de Solicitud Extradiction de Pinochet, *htttp://www.ua.es/up/pinochet/documentos/auto–03–11–98/auto24.htm* (last accessed 3 April, 2001)

[47] Audiencia Nacional, Auto del Juzgado Central de Instrucción No. 4, 6 February 2008, 151–157, cited according to International Law Commission, Immunity of State officials from foreign criminal jurisdiction: memorandum / by the Secretariat, 31 March 2008, *A/CN.4/596*, para.101, available at: *www.unhcr.org/refworld/ docid/48abd597d.html* [last accessed 2 November 2009]

from criminal prosecution is absolute.[48] In another decision, in a case involving assets *de facto* controlled by the President of Gabon, the Federal Tribunal only signaled that immunity of a serving Head of State might be limited.[49]

Under the *United States'* law, discretional suggestions of the executive branch are decisive in granting immunity to a Head of State.[50] There were several proceedings in civil law suits in which the US courts granted immunity.[51] In a 1980s case, the US court ascertained the Head of State immunity for the President of Philipines Marcos, but the court withdrew the immunity once Marcos had ceased to be in the office, thus suggesting non-recognition of functional immunity.[52] The US government's suggestion of immunity trumped even the home country's waiver for the ex-president of Haiti Aristid.[53] In *Kadic v. Karadzic*, the explanation the court gave suggests that Radovan Karadzic would have been afforded immunity, had the United States' government recognized him as a Head of State.[54] In two most recent cases, a US appeals court confirmed absolute Head of State immunity of the former President of China, Jiang Zemin,[55] whereas another US appeals court upheld the immunity of the President of Zimbabwe Mugabe, but on the basis of diplomatic immunity.[56]

In continuing attempts to prosecute the former president of Chad Hissene Habré, a court in *Senegal* first dismissed the charges for the lack of jurisdiction, without deciding on immunity of Habré, who, as an ex-president at the time of initiation of the proceeding, was certainly not

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[48] See P.Gully-Hart, "The Function of State and Diplomatic Privileges and Immunities in International Cooperation in Criminal Matters: the Position of Switzerland", *Fordham International Law Journal* 23/1999, 1337–38.

[49] *Ibid*., 1338–39, 1442.

[50] See A. Fitzgerald, "The Pinochet Case: Head of State Immunity within the United States", *Whittier Law Review* 22/2001, 1004–1005.

[51] he only criminal lawsuit involving immunity of a Head of State was *United States v. Noriega*, but the court denied immunity to Manuel Noriega solely on the grounds that he had never been elected or served as the constitutional Head of State of Panama. *United States v. Noriega*, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990).

[52] *Republic of Philipines v. Marcos*, No. 84–146, (N.D. Cal. 1987) and *Domingo v. Marcos*, No. C82–1055-V, (W.D. Wash. 1982).

[53] *Lafontant v. Aristid*, 139–40

[54] *Kadic v. Karadzic*, 70 F.3d. 232, 236–237 (2d. Cir. 1995)

[55] *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir. Sept. 8, 2004).

[56] *Tachiona v. United States*, 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir. Oct. 6, 2004).

See S. Andrews, "U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin', ASIL Insight, November 2004, available at www.asil.org/insights/2004/ 11/insight041122.html.

protected by personal immunity.[57] The UN Committee against Torture upheld the right of Senegal to try the former president Habré since it established that Senegal had violated the Torture Convention by failing either to prosecute or extradite him. Finally, in 2006, Senegal agreed to prosecute Habré at the request by the African Union, which found, although in a manifestly political decision, that it is both lawful and legitimate if Senegal exercises its jurisdiction over the *former* foreign Head of State.[58]

1.4. International forum as the (best) resort: cautiousness of the ICJ

1.4.1. ICJ's Arrest Warrant case (Congo v. Belgium)

Another turning point in filling in the body of law on Head of State immunity came with the decision of the International Court of Justice in the *Arrest Warrant* case (*DR Congo v. Belgium*).[59] The ICJ found Belgium, which circulated an international arrest warrant against the Congolese minister of foreign affairs, to have infringed inviolability and immunity from criminal jurisdiction that foreign ministers enjoy under international law.[60] The ICJ identified no basis in customary international law that would allow for any form of exception to the rule according immunity from criminal jurisdiction and inviolability to sitting ministers of foreign affairs, even when they are suspected of war crimes and crimes against humanity.[61] Although the Court claimed it "extensively examined State practice, including national legislation and those few decisions of national highest courts" the judgment itself seems to be poorly explained providing little references to examples of such state practice and legislation, apart from citing *Pinoche* (UK) and *Ghadafi* (France) cases.[62]

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[57] R. Brody, "The Prosecution of Hissene Habre – an "African Pinochet", *New England Law Review* 35/2001, 329–334. Hissene Habre ruled Chad from 1982 to 1990 when he escaped to Senegal after he was ousted from the power.

[58] See Human Rights Watch, *The Case against Hissene Habre, an "African Pinochet",Case Summary*, May 2008, *www.hrw.org/english/docs/2005/09/30/chad11786.htm* (last visited 23 March 2009).

[59] International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*), CR 2000/32, Judgment of 14 February 2002 (hereinafter *Arrest Warrant*), *http://www.icj-cij.org/docket/files/121/8126.pdf.*

[60] *Ibid.,* para.71. The Court found, with several separate and dissenting opinions, that the mere issuance of the arrest warrant, even if no enforcement action was subsequently taken, infringed the Congolese minister's diplomatic immunity. *Ibid*, paras 70–71.

[61] *Arrest Warrant*, Judgment, para. 58.

[62] See *Ibid*. Some authors also criticized such a lack of argumentation remarking that immunity was "assumed by the Court, not established", see P. Sands, "International

There were submissions by the case parties that shared common positions, and this could be regarded as particularly reflective of their *opinio iuris* in relation to personal and functional immunities. Namely, certain arguments raised by Belgium indicated that it recognized immunity *ratione personae.*[63] *On the other side, the Congo acknowledged the existence of the international law principle deriving from the Nuremberg and Tokyo tribunals that official capacity of the accused at the time of crime did not exempt him from criminal responsibility before either international or domestic court.*[64]

The Court, which equated immunity of foreign ministers with that of Heads of State,[65] determined, in a key dictum of its judgment, only four situations in which immunities are not a bar to prosecution of highest state officials. Such persons may be prosecuted: *a)* by their own country, or *b)* by a foreign court, if the state they represent or have represented waive their immunity, or *c)* once they cease holding the office, but for acts committed prior or subsequent to the period in office, whereas for acts during the office only for those committed in *private* capacity, or *d)* by certain international courts, such as – in the Court's *exempli causa* enumeration – the ICTY and the ICTR, as well as the ICC.[66] These four possibilities for exercising jurisdiction over a foreign Head of State are of a very limited reach and, apart from the fourth situation, they do not bring much of a novelty to international law. The first situation is not an issue under international law, but rather an indisputable matter of state's internal affairs, whereas the second one is just a confirmation of what has already been well-established under international law – that immunity belongs to the sending state, not to an individual. As for the third situation, the Court did not indicate what would constitute a private act, which opens the door not only to construing the notion of such acts in line with the *Pinoche* decision – that acts are not official if amount to most serious international crimes, but also allows for recoiling back to more conservative and restrictive approaches. By referring to the fourth situation, the Court apparently defined the only niche where immunities, either functional or personal, cannot be a defense from prosecution – and that is before an international court. Although the Court also stated a principle that immunity from jurisdiction enjoyed by incumbent state officials does

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Law Transformed? From Pinochet to Congo...?", *Leiden Journal of International Law* 16/2003, 46–47.

63 See *Arrest Warrant*, *Verbatim rec. CR 2000/34, available at http://www.icj-cij.org/docket/files/121/4237.pdf.*

64 *Arrest Warrant*, Judgment, para. 48.

65 *Ibid,* paras 51, 53 and 59.

66 *Arrest Warrant*, Judgment, para. 61.

not mean impunity,[67] it did not provide sufficient room for such a principle to be properly applied in practice, as the it reserved the right to disregard the immunity of a Head of State only for international courts.

The ICJ acknowledged the difference between immunity from criminal jurisdiction, as procedural in nature, and criminal responsibility, as a matter of substantive law,[68] but it failed to properly articulate difference between immunity *ratione materiae* and *ratione personae*.[69] The court also failed to recognize that functional immunity should be lifted, making, instead, the aforementioned distinction between acts in private capacity and official acts, which seems to have been abandoned in international law, at least with regard to international crimes.[70] The ICJ restated the *Arrest Warrant*'s holding that "Head of State enjoys full immunity from criminal jurisdiction" in a more recent case, *Djibouti v. France*, in which the parties themselves did not dispute personal immunity of Heads of States.[71]

The *Arrest Warrant* judgment has been widely criticized and considered a step back, especially if compared with the *Pinochet* decision, in determining the current status of state officials' immunity and for its restrictive list of exceptions to immunities from prosecution for most serious international crimes.[72] Although ICJ decisions are, in principle, binding only between the parties and in respect of the particular case,[73] this judgment, as all ICJ decisions, is considered an extrapolation of customary international law that unavoidably creates an authoritative precedent and influences practice of states and international or hybrid courts. It would certainly limit the role of national courts in prosecuting foreign Heads of States for international crimes. It may also made discussion on immunities confined only to the argumentation if a forum seized with a

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67 *Ibid*, para. 60.

68 *Ibid*.

69 This has been criticized by some scholars. See A.Cassese, "When May Senior Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", *European Journal of International Law* 13/2002, 862, J. Wouters, "The Judgment of the International Court of Justice in the Arrest Warrant case: some critical remarks", *Leiden Journal of International Law* 16/2003, 259–261.

70 *Arrest Warrant*, Judgment, para.61. For criticism, see A. Casese, (2002), 867–870. See also *Pinochet III*.

71 ICJ, *Case concerning certain questions of mutual assistance in criminal matters* (*Djibouti v. France)*, Judgment of 4 June 2008, available at *www.icj-cij.org/docket/files/136/14550.pdf* (last accessed 10 October 2009), para. 164–166, 170. The case was given rise by France sending witness summons addressed to Djibouti's Head of State.

72 S.Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case", *European Journal of International Law* 13/2002, 881 and 890, J. Wouters, 259–261, P. Sands*,* 47–51, A. Casese, (2002), 862–866.

73 Statute of the International Court of Justice, Article 59, available at *http://www.icj-cij.org/documents/index.php.*

concrete proceeding can be matched with one of the three courts that the judgment referred to – the ICTY, ICTR, or the ICC.

1.4.2. Hybrid courts and the Charles Taylor decision

Creation of the so called hybrid (mixed, internationalized) courts or tribunals further affirmed the exemptions from immunity.[74] The Statute of the Special Court for Sierra Leone has a provision on irrelevance of immunities identical to that from the ICTR and the ICTY statute respectively.[75] Regulation 2000/15 of the East Timor UN Transitional Administration, which established the East Timor Court (Serious Crimes Panels), contains an article on immunities mirroring Art 27(2) of the Rome Statute, explicitly denying both functional and procedural immunity to defendants.[76]

The Special Court of Sierra Leone (SCSL) ruled, in 2007, that no immunity was a bar to the prosecution of the ex-president of Liberia Charles Taylor before that court. Taylor contended that indicting an incumbent Head of State was contrary to international law, citing i.a. the *Arrest Warrant* judgment,[77] but, noticeably, even Taylor himself admitted that *ratione materiae* immunity would not protect him from responsibility for any international crime committed while in office.[78] The Special Court based its decision to reject Taylor's immunity arguments on the ICJ's standing that exceptions to immunity can only be made in prosecution before an international court.[79] There has been some criticism of the Spe-

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[74] Currently, hybrid courts include the courts set up in Sierra Leone, East Timor and Cambodia, as well as the UNMIK/EULEX courts in Kosovo.

The hybrid court in Cambodia is bound by a norm on immunity very similar to those in the ICTY, ICTR and the Sierra Leone statutes, but this court deals with former Khmer Rouge leaders, who are all Cambodian nationals. See Law on the establishment of Extraordinary Chambers in the Courts of Cambodia, (*NS/RKM/1004/006*), Article 29(2), *www.derechos.org/human-rights/seasia/doc/krlaw.html.*

[75] Statute of the Special Court for Sierra Leone, annexed to the Agreement (16 January 2002), Article 6(2), *www.sc-sl.org/scsl-statute.html.*

[76] UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, at *www.un.org/peace/etimor/untaetR/Reg0015E.pdf*.

[77] SCSL, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, paras. 6–8, at *http://www.sc-sl.org/SCSL–03–01-I–059.pdf.*

[78] *Prosecutor v. Taylor*, Defense Preliminary Motion to Quash the Indictment and Arrest Warrant against Charles Ghankay Taylor, 23 July 2003. Taylor is indicted for crimes against humanity, war crimes and other serious violations of international humanitarian law committed in relation to the Sierra Leone conflict.

[79] *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, paras. 37–52, 53. Amicus brief by professor D. Orentlicher concluded that indicting Taylor was not in breach of the international norms governing immunity because the SCSL was of international character. See D.F. Orentlicher, *Submission of the Amicus Curiae on Head of*

cial Court's decision, which have argued that international features of the SCSL were not sufficient enough to make this court international in the sense of the *Arrest Warrant*'s reference to 'certain international courts'.[80] The critics suggest, instead, that the SCSL should have either substantiated its decision by invoking progressive emerging tendencies which remove immunity even for incumbent Heads of State if charged with international crimes,[81] or, what these authors see as better reflecting the current international law, the Taylor's immunity *ratione personae* should have been upheld, since this court was not entirely international in the ICJ's requirement sense.[82] In any instance, while non-application of functional immunity remained uncontested in the Taylor trial, in determining if personal immunity should prevail the decisive issue has boiled down to the question whether the particular court that tries a Head of State is national or international one.

2. STRIPING OFF IMMUNITIES: HOW FAR TO GO

In the past sixty years, international law governing Head of State immunity has undergone a tangible transformation from the uniquely accepted absolute privilege and protection of statesmen to its erosion in certain instances. The rules regulating this matter are not uniquely applied or with a definitive form and content, and they are still evolving. Customary international law has been a source where to seek guidance when dealing with a Head of State in a forum outside his/her own country. Certain treaties, especially the Genocide Convention and the Torture Convention, as well as the unanimously adopted 1946 General Assembly resolution and the authoritative 1996 ILC Draft, have all been reference points in formatting and determining customary law norms.[83] Conventional rules on the matter, however, are scarce, and customary law has been shaped not only by state practice, but also, and more extensively, through setting up of international criminal tribunals and the ICC.

State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor, SCSL–2003–01–1, 14–22 and 26 (on file with the author). Another amicus brief, also argued that an international criminal court or tribunal, not necessarily Chapter VII based, may exercise jurisdiction over a serving Head of State. See *Prosecutor v. Charles Taylor,* Submissions of the Amicus Curiae on Head of State Immunity, paras. 56, 118, at *www.icc-cpi.int/library/organs/otp/Sands.pdf*.

[80] See S. Deen-Racsmany, 313–317. See also S. M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: the *Arrest Warrant* Case Continued", *Leiden Journal of International Law*, 18/2005, 656–657.

[81] S. M. H. Nouwen, 664 and 668.

[82] S. Deen-Racsmany, 315–321 and S. M. H. Nouwen, 667–669.

[83] For the ICJ's confirmation of the role of international agreements in formation of customary law, see ICJ, *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Report 1969, paras.60–74, *www.icj-cij.org/docket/files/52/5561.pdf.*

The statutes of the Nuremberg tribunal, the ICTY and the ICTR, taken together with some of their decisions, established or confirmed important principles and exerted a strong influence both on codification and progressive development of the rules on immunities, moving such rules towards the decline of any immunity in respect to international crimes. The ICTY and ICTR statutes emanate from customary international law and they are Chapter VII powered, yet the reach of these tribunals is limited to the particular territories, situations and actors. Although the Chapter VII origin certainly amplifies the role of the ICTY and the ICTR, including the *Milošević* precedent, the main argument as to the significance of the two *ad hoc* tribunals for the narrowing down Head of State immunity may be found in the drafting history of their statutes and in the assertion that they meant to embody pre-existing customary international law norms, including those on irrelevance of official immunity. The ICC Rome Statute seems to play a more important role, as a multilateral treaty, binding upon all the parties which agreed to abolish explicitly both functional and personal immunity in cases of international crimes dealt by the Court. The provisions set forth in the ICTY, ICTR and ICC statutes have also been copied and affirmed in the statutes of more recently established hybrid courts in East Timor, Sierra Leone, and Cambodia. High number of state parties to the Rome Statute is indicative of the willingness of the majority of countries to adhere to limitations of immunity and it supports contention that the ICC Statute has codified the rule that immunity of highest state officials, including Heads of State, can no longer be recognized for certain international crimes.[84] However, in situations in which the ICC does not exercise jurisdiction, the state parties still remain bound by general international law norms on immunity of officials.

The International Court of Justice also stepped in to arbitrate on the matter, and the exceptions to the prevailing rule of recognition of immunity that the *Arrest Warrant* determined either expose only official's private acts to prosecution before a foreign court (leaving the notion of 'private act' to be argued about), or empower only international courts to disregard immunities. While making a welcome verification that immunity is excluded before international courts, the ICJ has nonetheless introduced an unwarrantedly closed circle of possibilities for prosecution of highest state officials.

There has been a number of proceedings for international crimes against foreign officials before national courts, but only a very few against foreign Heads of State.[85] They show some disparities and implications of

[84] As of 21 July 2009 there are 110 state parties to the ICC Rome Statute (a list of ICC state parties available at *http://www.icc-cpi.int/Menus/ASP/states+parties/*, last visited 25 October 2009.

[85] See A. Casese, (2002), 870–871, for a brief list of prosecution of foreign officials (not only Heads of State) and practice of courts in Britain, France, the Netherlands, Israel, Spain, US, Italy and Mexico.

precedents at national level are not easy to identify and assess. The *Pinochet* case in the UK affirmed personal immunity, but gave rise to the claims that international law encounters a new customary rule which strips traditional immunity from the highest state officials who have committed the gravest human rights violations. Even though not much of a like state practice has been seen after the *Pinochet*,[86] this decision was a move ahead. Although seriously challenged by the ICJ's *Arrest Warrant* decision a few years ago, it has made a doctrinal influence as a model ruling, which defined official acts through the duty of a Head of State to protect his subjects, not to grossly violate their rights and widened a gap in protection of the dictators.

As early as before the ICC Statute was adopted, and the *Pinochet* and the *Arrest Warrant* decisions passed, there had been a range of doctrinal views distinguishing limitations to immunity of Heads of State. In Sir Arthur Watts' contention from his early nineties seminal work, personal liability of a Head of State who authorized or perpetrated serious international crimes was already a matter of customary international law.[87] In the same time, Watts considered such a body of rules, which had emerged, to be "in many respects still unsettled, and on which limited state practice sheds an uneven light".[88] There were also even more liberal views suggesting that the general rule of international customary law was that of non-immunity,[89] or, at least, that such rule exist in the context of human rights abuses.[90] On the other side, there were opposite views too, arguing that denial of immunity to Head of State, even in case of human rights violations, is both illegal and politically unwise.[91]

All the aforementioned developments taken together speak of the fact that the idea of holding Heads of State accountable for international crimes has been rising, followed slowly, but progressively, with corresponding rules. Genocide, crimes against humanity, war crimes, as well as torture (although before *Pinochet* case often not included in such a list), are international crimes that so far have been undisputedly recog-

[86] For deliberation on state practice before and after the *Pinochet* see, for example, M.M. Penrose, "It's Good To be the King!: Prosecuting the Heads of State and Former Heads of State under International Law"*, Columbia Journal of Transnational Law* 39/2000.

[87] A. Watts, (1994), 84

[88] *Ibid.,* 52

[89] H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', *British Yearbook of International Law* 28/1951.

[90] J. Paust, "Draft Brief concerning Claims to Foreign Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law under the FSIA", *Houston Journal of International Law* 8/1985, 51–54.

[91] A. Zimmerman, "Sovereign Immunity and Violations of International *Jus Cogens* – Some Critical Remarks", 16 *Michigan Journal of International Law* 16/1995.

nized as those that may render immunity irrelevant. These are acts of such seriousness that they do not constitute merely international wrongs, but rather the crimes that offend the public order of the international community.[92] In other words, the gravity of these crimes warrants an exception to the general rule of immunity. As for international offences outside the aforementioned cluster of crimes, or for acts constituting what is colloquially called 'ordinary' crimes, there is no support in international law, as it stands now, that immunity can be denied in such situations as well.

The question still pulsating, however, is whether both types of immunity – functional and personal – can and should be removed in cases of the most serious international crimes, and which court is entitled to disregard these immunities. The answer is somewhere between rooting out impunity and preserving immunity.

2.1. Functional immunities

The prevailing rule today seems to be that immunity *ratione materiae* cannot shield anyone from prosecution for genocide, crimes against humanity, war crimes or torture. The statutory provisions of the ICC, ICTR, ICTY and hybrid tribunals, some of their decisions, as well as the norms of certain international treaties, draft treaties and resolutions have all explicitly or implicitly led to abolishing *ratione materiae* immunity of Head of State for such crimes. The holdings in certain cases before the national courts, or at least the approaches assumed by the courts, also confirm the move towards non-recognition of Head of State functional immunity.

Legal scholars have extensively argued against functional immunity for international crimes. Some authors submit that acts amounting to international crimes cannot be considered official acts,[93] others that prohibition of such acts, as peremptory norm, prevails over rules on immunity which have no *ius cogens* status.[94] Some authors reject such justifications and derive basis for exemption of immunity for official acts from provisions in the statutes of international courts and tribunals which do not recognize official capacity as a substantive defense from criminal responsibility and from the nature of universal jurisdiction which excludes functional immunity.[95]

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[92] See also A. Watts, (1994), 81.

[93] See, for example, A. Bianchi, "State Immunity to Violations of Human Rights', *Austrian Journal of Public International Law* 46/1994, 229.

[94] A. Bianchi, "Immunity Versus Human Rights: The Pinochet case', *European Jopurnal of International Law* 10/1999, 237– 265, A. Orakhelashvili, "State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong", *European Journal of International Law* 18/2008, 964.

[95] D. Akande (2004), 414–415.

Immunity *ratione materiae* and international crimes are inherently incompatible. The labeling of gravest criminal acts as an exercise of state functions that entail immunity would go against the rationale and purpose of many international treaties, such as the Genocide Convention, the Geneva Conventions, or the Torture Convention, which laid down peremptory norms of international law that impose unconditioned prohibition of such acts. The purpose of these conventions would be especially frustrated if we wrap violations thereof into the meaning of 'official acts', particularly when bearing in mind that crimes against humanity or genocide are most often committed exactly as a part of execution of an official policy. Since the prohibition of such crimes represents *jus cogens,* it is of a higher value and ranking then the customary rule of immunity that obliges a state not to sit in judgment for head of another state, and for which no evidence can be found to confirm its *ius cogens* status. In addition to that, all these treaties require states to prosecute the responsible for crimes and, if appropriate, ascertain universal jurisdiction, and there is nothing in these norms that would allow for exceptions.[96] Such norms would be defeated if someone is exonerated from criminal responsibility for the mere reason that he/she belongs to the very top of the hierarchy.

Therefore, it can be said that customary international law allows for an exception to *ratione materiae* immunity in case of certain international crimes, not only in proceedings before international courts, but also in prosecution of foreign Heads of State before domestic courts.[97] However, at the current stage, there is neither wide, nor coherent practice of states to deny immunity to foreign former Heads of State before national courts. Hence, there is still no sufficient ground, especially after the *Arrest Warrant*, for a conclusion that the customary rule has petrified to a degree that obliges states to deny functional immunity to a foreign Head of State in case of international crimes. However, there is undoubtedly no longer an obligation to grant such immunity either. At best, states *may* and should deprive a former Head of State of his immunity, and such an act must not be considered as a violation of international law and internationally wrongful act encountering state responsibility.

2.2. Personal immunities

Whilst functional immunity is no longer a shield from criminal responsibility, immunity *ratione personae,* at the current stage of international law, continues to remain a defense from prosecution of

[96] See 1948 Genocide Convention, Article 6, 1949 Geneva Convention I, Article 49, Geneva Convention II, Art 50, Geneva Convention III, Article 129, Geneva Convention IV, Article 146, 1984 Torture Convention, Article 5.

[97] For similar opinions, see A. Casese,(2002), 870–874, S. Wirth, 877, A. Orekhelashvili, 964, P. Gaeta, (2002), 982, Bianci, 261. Also International Law Commission, para. 204.

Heads of States, as it follows from the provisions and jurisprudence analyzed so far. In absence of compelling evidence to the contrary, the exceptions to personal immunities appear to be confined to international tribunals and to the ICC and within the parameters of their respective mandates and jurisdictions.[98] No state practice has evinced so far that personal immunities can also be rendered irrelevant before national courts. Quite contrary, the preservation of Head of State personal immunity before national court has been upheld by domestic courts in the UK, Spain, France, US and other countries and, arguably in the most authoritative way, in the ICJ's *Arrest Warrant* judgment. Therefore, customary international law still does not allow for a departure from the rule that an incumbent Head of State cannot be prosecuted before a foreign court state however heinous are the crimes that the official is accused of.[99] The inviolability of personal immunity, as opposed to functional, which can no longer hold as defence, has been recognized even by some of the very progressive doctrinal documents such as the Princeton Principles on Universal Jurisdiction,[100] 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law, adopted by the Institut de Droit International,[101] or International Law Commission 2008 Memorandum.[102]

The main rationale for explaining why the state practice has not been permissible to departures from *ratione personae* immunity lies in the need to enable state officials to carry out their functions and represent their country without any foreign interference.[103] States tend to avoid diplomatic and political consequences of unilateral prosecution of other states' officials, and in the same time they want to protect their own highest officials from obstruction by other states. States still find personal immunity both as a binding norm and a rational choice conducive to the smooth conduct of international relations. To completely sweep out immunities and make possible for a national court to prosecute an incumbent foreign Head of State – however righteous such resort might seem to be – can open a door to arbitrary prosecution of foreign officials

[98] For contesting opinions, that even the Nuremberg Charter and the ICTR and ICTY statutes were not explicit enough to remove personal immunity as they did with functional immunity, see S. Houven, 661 and S. Deen-Racsmany, 315.

[99] See A. Casese, (2002), 865, P. Gaeta, (2002), 987– 988, S. M. H. Nouwen, 667, S. Deen-Racsmany, 313, D. Akande (2004), 411, S. Wirth, 877–893.

[100] Principle 5 of The Princeton Principles of Universal Jurisdiction, Princeton University Program in Law and Public Affairs, *The Princeton Principles of Universal Jurisdiction* 28/2001, *http://www1.umn.edu/humanrts/* (last visited 24 March 2009).

[101] Article 13(2) of the Resolution, according to H. Fox, "The Resolution of the on the Immunities of Heads of State and Government", *International Comparative Law Quarterly,* 51/2002, 121.

[102] International Law Commission, para.99, 148.

[103] *Arrest Warrant,* Judgment, para 53, also offers such an explanation.

and cause destabilization, retorts and many other unintended consequences for international relations. As a defense of procedural nature, personal immunity does not mean justice denied, but rather justice delayed – until the Head of State steps down. As a *temporary* sacrifice of justice for the good of stability and peaceful conduct of international relations, personal immunity before national courts should stay in place as a bulwark for serving Heads of State, same as for other incumbent high officials and diplomats, to avoid risks of opening a Pandora box of voluntarism of individual states taking justice on their own, even when acting with a good cause.

Therefore, an international tribunal or court remains the only option for prosecuting a serving Head of State, unless his/her own state decides to prosecute or waive the immunity for trial before a foreign court. How inclusive such an option can be will depend on what would be construed as an 'international' court. To suggest an answer to that question, first has to be highlighted why international court is considered the best or, so far, the only forum that can set aside personal immunity. The main rationale is that it does not compromise the principle that states do not judge on the conduct of each other (*par in parem non habet judicum*), which lies in the very foundation of equal sovereignty of states and international relations, and protects states from undue interference by other countries. States could hardly legitimize their refusal to accept jurisdiction of an international or internationalized body, which derives its mandate either from a treaty or from representative will of the international community, and which does not signify an exercise of unilateral sovereignty or other countries' arbitrary will.[104] Therefore, when international community is represented – trough the UN, or, possibly, through a regional organization – in the process of setting up such a court, it should be equated with international courts. The notion of international court that the ICJ points to in the *Arrest Warrant* should be, accordingly, interpreted broadly, not only to include the treaty based ICC, or the outgoing ICTY and ICTR, or some future Chapter VII based tribunals, but also a hybrid court or tribunal which disposes of significant international element, like the Special Court for Sierra Leone.

2.3. Flip side of the compromise

The parallel treatment of immunity – one by denying any immunity before an international court, and the other, embracing absolute immunity of an incumbent head of state before foreign courts – is also reflective of the long lasting tension between two perspectives: one, often regarded as human rights or accountability approach, which sees the primary purpose of the present time international law in protecting certain

[104] See *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, para 51.

values and individuals, and the other, that regards international law as mainly intended to service relations among states and uphold state sovereignty. Finding a difficult, but necessary balance between the two, which sometimes also amounts to a compromise between justice and interest of inter-state relations, is an open-end dilemma.

Judging on the immunity of a foreign Head of a State is almost always likely to be influenced by political considerations and even deference to political prerogatives. To promote justice through legal accountability of the leaders could sometimes go to the detriment of important political processes in countries where the crimes have taken place, in which such leaders are often key players, and threaten to destabilize their transition into democratic societies. On the other and, since immunity *ratione personae* shields only as long as a person is in the office, that may encourage dictators to be persistent in holding onto their power at all costs, since most serious international crimes are usually the legacy of the leaders and regimes that do not seek support at democratic elections; and once they step down, they often do so with amnesty-like political compromises keeping the threat of the recurrence of instability as their laissez-passer. This may leave victims waiting for justice indefinitely, since the ICC has its intrinsic temporal, territorial and personal limitations, whereas establishing an *ad hoc* international or hybrid court necessitates almost discouraging amount of good will of states, negotiation, agreement and resources. Furthermore, if states decide to strictly adhere to the ICJ's *Arrest Warrant* reading of the difference between private and official acts, the dictators could continue to be immune before foreign courts even after ceasing to hold the post, and this may keep maintaining already voluminous historical record of countries' tolerance, sometimes amounting to benevolence, towards foreign ex-dictators.

It is still mainly in the hands of the international courts, especially the ICC, to correct the reluctance or incapacity of states to try foreign leaders, but international law today is broadening its tools, making possible and realistic that even the highest ranking transgressors of humanitarian law and human rights norms at least do not enjoy their days after leaving the power. The emerging trends could be ushering us in the era when there would be less safe heavens for human rights oppressors. Head of State immunity, once the most reliable life vest for many dictators, seems to still keep them from sinking, but it is more and more holed.