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„An Assessment of whether Functional and Absolute Immunities can be invoked in Criminal Proceedings by Foreign State Officials in Relations to International Crimes“

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List of International Instruments

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Convention on the Prevention and Punishment of the Crime of Genocide 1948

Optional Concerning Compulsory Settlement of Disputes 1961

Optional Protocol concerning Acquisition of Nationality 1961

Vienna Convention on Diplomatic Relations 1961

Vienna Convention on Consular Relations 1963

Convention on Special Missions 1969

UN Convention against Torture 1984

Statute of the Rome International of the International Criminal Court 1998

List of ICJ and National Case Laws

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Judgment, I.C.J. Reports 2002.

Empson v Smith [1966] 1 Q.B 426, England, Court of Appeal.

Dickinson v. Del Solar, King's Bench Division, England, 1 K.B 376 (1930).

Jurisdictional Immunities of the States (Germany v Italy), I.C.J. 2012.

Marcos v Federal Department of Police (1989) 102 I.L.R 53.

Mugabe case, reported at (2004) 53 ICLQ 769.

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, House of Lords, 1999.

Prosecutor v Blaskic Case No. IT-95-14-A ICTY Appeals Chamber 29 July 2004.

Rex v. A.B [1941] 1 K.B. 454 (1941), Court of Criminal Appeal, England.

The Re Rissmann Case (Corte di Cassazione, 1972) (Italy, 1970), (1973) 9 RDIPP 121.

The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812).

Underhill v Hernandez 168 U.S. 250 (1897), U.S. Supreme Court.

Zoernsch v Waldock [1964] 1 Weekly Law Reports 675.

List of Acronyms

ACICTFY	Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia
CSM	Convention on Special Missions
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations

I) Introduction

Background

State-appointed officials or agents within the framework of the institutions of diplomatic envoys conduct the foreign relations of states.¹ The officials or agents conducting such relations should be able to do so without the fear of legal ramifications; this is the basis of diplomatic immunity.² Another class of persons who conduct the business of a state in other states is consular officials or consuls. The functions of consuls are often twofold. First, they safeguard the interests of the states that appoint them.³ Second, they are supposed to negotiate and further the economic and trade relations between their states and the hosting states.⁴ Notably, a consul is not considered a diplomat. The international law demands that law enforcement authorities of a state should extend certain specific privileges and immunities to officials of other states working as foreign diplomats and, in many other cases, consular officials. Most important, such protection must also be granted to a visiting head of state and a head of government.

Diplomatic immunity is different from consular immunity; *prima facie*, this is evidenced by the fact that they each fall under different international legal regimes. Diplomatic immunity is considered under the 1961 Vienna Convention on Diplomatic Relations (VCDR),⁵ while consular immunity is granted under the 1963 Vienna Convention on Consular Relations (VCCR).⁶ Diplomatic immunity includes privileges that derive from the 1961 VCDR. The two conventions exempt certain state officials from criminal and civil jurisdictions of host states, even though immunity under the 1963 VCCR is not as elaborate as the immunity granted under 1991 VCDR, mainly because of the scope of the functions of diplomats and consuls.

Notably, the immunities under the two conventions vary significantly. For instance, under Article 31 of the 1991 VCDR, diplomats are not immune from criminal and civil jurisdictions of the receiving states with regard to disputes involving personal real property, issues pertaining to private estate matters or disputes that are outside the scope of official duties. Importantly, as diplomats enjoy immunity from criminal jurisdictions of receiving states, consuls are not. These arguments are developed in detail later in this research paper.

¹ Patrick McGowan, Scarlett Cornelissen and Philip Nel, Power, *Wealth and Global Equity: An International Relations Textbook for Africa* (Johannesburg: Juta and Company Ltd, 2007), 124.

² David B. Michaels, *International Privileges and Immunities: A Case for a Universal Statute* (New York, NY: Springer Science & Business Media, 2012), 42.

³ Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (New York, NY: Springer, 2012), 235.

⁴ Ibid.

⁵ *Treaty Series*, vol. 500, p. 95.

⁶ *Treaty Series*, vol. 596, p. 261.

The question of immunity under international law only arises in the context of state jurisdiction.⁷ When a state grants immunity to officials of foreign states, it generally declines the exercise of its criminal and civil jurisdictions with respect to such officials. Otherwise, if it refuses to grant immunity, it means that it asserts foregoing jurisdictions with respect to those officials. Logically, matters that pertain to jurisdiction are antecedent to issues of immunity, a point that the International Court of Justice (the ICJ) reiterated in the *Arrest Warrant Case*.⁸ The facts of the case were that a Belgian magistrate, exercising the country's domestic law on universal jurisdiction, issued an international arrest warrant against Abdoulaye Yerodia Ndombasi, who then was the foreign minister of the Democratic Republic of Congo (DRC). The DRC objected to the warrant of arrest, arguing that it infringed on state immunity. State immunity demands that a sovereign state cannot exercise its judicial authority over another state; this falls under the concept of the sovereign equality of states, which is articulated in Article 2 of the Charter of the United Nations. The ICJ adopted the reasoning of the DRC and ruled that the minister enjoyed immunity under international law, unless certain conditions are fulfilled: the accused person is prosecuted by his or her own states; his or her immunity is lifted by the state that he or she represents; he or she stops being the relevant person; or the trial is to proceed under an international tribunal or court, such the International Criminal Court (the ICC).⁹

Notably, controversies still persist as the extent to which the doctrine of immunity, particularly functional and absolute immunity, can be invoked with regard to international crimes and before a foreign court exercising criminal jurisdiction.¹⁰ Therefore, the focus of this research will be the assessment of whether functional and absolute immunities can be invoked in criminal proceedings by foreign state officials before a foreign court with respect to international crimes.

Problem Statement

It is notable that many legal scholars have examined functional and absolute immunities with respect to foreign state officials. In this case, the question arises why a further assessment of the same subject is still necessary. The answer to the question lies in the fact that the emergence of fundamental human rights law at the international level has brought to the fore the issue of individual liability. In this case, the studies that have been done with regard to invoking the two

⁷ Ramona Padretti, *Immunity of Heads of State and State Officials for International Crimes* (Boston, MA: Martinus Nijhoff Publishers, 2014), 80.

⁸ *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice.

⁹ *Ibid.*

¹⁰ See Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (New York: OUP Oxford, 2011), 80; Douglas Guilfoyle, *International Criminal Law* (New York, NY: Oxford University Press, 2016); Padretti, *Supra* note 7 at 33.

types of immunities with respect to criminal liability under international human rights law are still inadequate, given the divergent views of different legal scholars. For instance, advocates of human rights argue that, due to the continuing developments in the field of international human rights, state immunity cannot be extended when some international norms are violated.¹¹

On the contrary, another group of scholars maintains that, even in light of the foregoing developments, the immunities are still available even in the context of the violation of international human rights.¹² The group has adopted a formalistic argument that the practice of state immunity has achieved the state of customary international law, supported mainly by the doctrine of *opinio juris sive necessitatis* and state common state practice.¹³ In this regard, the argument of those who support the invocation of state immunity holds the view that human rights exceptions to the immunity rules may only take a gradual development and acceptance, not through the interpretation and application of the existing written or codified laws.¹⁴ Most importantly, there is the question as to when it can be considered that the rules of state immunity are in direct conflict with the duties and obligations of a state with regard to international human rights and international criminal law.

The advocates of the international human rights approach hold the view that the violation of human rights cannot be qualified as an act of state for purposes of state immunity theory, while the opponents of the same have advanced the argument that such state actions carried out by the military and the police are the epitome of sovereign state actions and, due to this, enjoy the cover of the theory of state immunity.¹⁵ It is important to examine the concept “act of state.” The act of state doctrine is one under which the legislations and judicial decisions having the force of law within the territory of a state are not subject to judicial inquiries by the courts of another state.¹⁶ The implication of the act of state doctrine is that the acts that have been committed by a state within its territory cannot be questioned or challenged in the courts of another sovereign state, even if such acts violate the norms of international law.¹⁷ The doctrine was first es-

¹¹ Sevrine Knuchel, ‘State Immunity and the Promise of Jus Cogens’ (2011) 9 *Northwestern Journal of International Human Rights* 149.

¹² *Ibid.*

¹³ Hazel Fox and Philippa Webb, *The Law of State Immunity* (New York, NY: OUP Oxford, 2013), 14.

¹⁴ Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (New York, NY: E. M. Meijers Inst., 2008), 10.

¹⁵ See Scott Shreeran and Nigel Rodley, *Routledge Handbook of International Human Rights Law* (New York, NY: Routledge, 2014), 358; William A. Schabas, *The Cambridge Companion to International Criminal Law* (Cambridge, UK: Cambridge University Press, 2016) 21.

¹⁶ Przemyslaw Saganek, *Unilateral Acts of States in Public International Law* (Boston, MA: BRILL, 2015), 17.

¹⁷ *Ibid.*

established in the case of *Underhill v Hernandez*.¹⁸ The facts of the case were that there were political movements in Venezuela and General Hernandez was in charge of the revolutionary army, which took over the government. As a consequence of the political movements, Underhill applied for a passport to leave the country and application was denied temporary. He was granted a passport to leave the country and returned to the United States (USA). At the time, the United States recognized the legitimacy of the government that was formed by Hernandez. When Underhill sued Hernandez in the Circuit Court to recover damages because he was denied a passport and was detained by Hernandez's authority, the court refused to grant his request arguing that the acts of Venezuela and, as such, were not justiciable in the United States' courts.¹⁹

In essence, the controversy of state immunity tends to arise out of the fact that both sides have tended to avoid a specific focus on the reason for the existence of the doctrine of immunity, but concentrates on the acts of a regime. Therefore, in order to contribute to the discourse, the aim of this thesis is to assess whether foreign state officials can invoke functional and absolute immunities in criminal proceedings in relation to international crimes before foreign courts.

Objectives

The following are the objectives that this research achieves in the end:

1. To provide a legal discussion as what are international crimes.
2. To provide better understanding to nature of both functional and absolute immunity under international law.
3. To provide a critical discussion on the foreign state officials who can enjoy functional and absolute immunities.

Research questions

The assessment has focused on the following questions:

1. What are international crimes?
2. What are functional and absolute immunity under international law?
3. Who can enjoy functional and absolute immunities?

Justification and Significance

This research is justified in the fact that the debate about the invocation of functional and absolute immunities under international law with respect to international crimes is not yet settled. Importantly, the significance of this assessment is both practical and theoretical. With respect to practical significance, the assessment will reveal which foreign state officials can invoke

¹⁸ *Underhill v. Hernandez*, U.S. Supreme Court, 168 U.S. 250 (1897).

¹⁹ *Ibid.*

the immunities and the circumstances under they cannot be afforded the same immunities. With regard to theoretical significance, the outcomes of the assessment contribute the already growing body of knowledge regarding both the functional and absolute immunities.

Methodology

The most used method in legal research is the doctrinal approach. The doctrinal method of legal research is important in terms of solving legal problems by closely examining and analysing various existing legal doctrines, cases that have been decided by competent national and international judicial institutions and legal frameworks in a systematic and scientific manner.²⁰ The doctrinal approach to legal research is important in three ways. First, it helps in the reflection of the normative intricacy of the law.²¹ Second, it provides detailed and complicated information regarding the way to handle conflicting legal arguments.²² Finally, the doctrinal approach is a precondition that is necessary for one to be able to undertake any form of analysis of the law.²³ In using the doctrinal method, the research employs hermeneutics, which is mainly about the interpretation of texts and arguments regarding certain choices among divergent possible interpretations.²⁴ It is important to note that, in a hermeneutic research study, texts, documentary materials are the fundamental research objects, and the interpretation of the contents of the same is the primary role of a researcher.²⁵ Hence, there hermeneutics can be used as an integral component of the doctrinal method of legal research.

The use of the doctrinal approach to research grounded on the notion of efficiency and the resolution of specific legal problems at the minimal time.²⁶ The doctrinal method of legal research follows certain steps. The first step is to assemble the relevant facts that have legal implications. Second, a legal researcher must identify the legal issues. Third, the researcher analyses the identified issues with the aim of searching for the relevant law. The fourth step is to locate and read relevant materials with a view to understanding the background information of the legal problems to be solved. Such materials may include scholarly books, journals, policy papers and reports on law reforms. Fifth, the researcher must locate and read relevant primary sources, what includes judgments. In the context of international law, the primary sources are conventions, declarations and treaties. The sixth step entails the process of synthesizing all the identified

²⁰ See Paul Chynoweth (in Andrew Knight and Les Ruddock), *Advanced Research Methods in the Built Environment* (Winchester, Hampshire: John Wiley & Sons, 2009), 28.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Peter Goodrich, 'Historical Aspects of Legal Interpretation' (1986) 61 *Indiana Law Journal*, 315.

²⁵ Ibid.

²⁶ Dawn Watkins and Mandy Burton, *Research Methods in Law* (New York, NY: Routledge, 2013), 9.

legal issues in the relevant context. The final step in a doctrinal research process is to come up with a tentative conclusion; tentative because the law is a field that continuously changes with environment.²⁷

By using the doctrinal method, both primary and secondary texts have been analysed and interpreted. In this regard, the primary sources have included judicially decided cases and international instruments touching on the subject matter of this study, while the secondary materials have included books, journals and researcher reports. The sources of information that have been used to compile this research include the library and online databases on legal matters and analyses. The primary materials have been obtained from the relevant sources. For instance, some international legal instruments have been obtained from websites of the International Committee of the Red Cross and the International Criminal Court in The Hague, Netherlands. Alongside the primary international legal instruments, relevant draft articles of the International Law Commission and Resolutions of the *Institut de Droit International* (Institute of International Law) have been used to analyse the development of law regarding immunities as to proceedings pertaining to international crimes before foreign national courts. Judicial decisions from both the ICJ and national courts have also been used as part of the materials.

II) Literature Review

Introduction

The Preamble of the 1961 VCDR states that, “recalling that people of all nations from ancient times have recognized the status of diplomatic agents.”²⁸ The implication of the Preamble is that, prior to its completion and coming into force, the roots of diplomatic immunities can be traced far back in history. Therefore, this chapter explores the evolution of diplomatic and consular immunities. The essence of this chapter is to place the concept of diplomatic and consular immunity into a historical perspective and to trace how it has evolved into the modern immunity as it is currently known.

Evolution of Diplomatic and Consular Privileges and Immunities

A number of scholars have been interested in carrying out research with regard to how diplomatic immunity has evolved to the modern status. Noting from the writing of different authors, especially Harold Nicolson, the importance of diplomatic immunity was realized in the prehistoric period, when different societies started to deal with one another for mutual benefits of

²⁷ Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: Teaching Materials* (2009) <<https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf>> accessed 9 June 2016.

²⁸ Paragraph 1, *Treaty Series*, vol. 500, p. 95.

their members.²⁹ Several researchers who have been interested in unravelling the concept of diplomatic immunity and its historical roots have quoted Harold Nicolson's work relating to the subject matter.³⁰ At that time, there were risks of negotiations failing because representatives were victimized at the expense of their masters.³¹ Therefore, according to Nicolson, it was soon discovered that no negotiations could be concluded successfully if representatives of either party were killed on arrival.³² Apparently, this discovery was the basis on which diplomatic immunity was established. A survey of various literatures reveals that the evolution of diplomatic immunity took place in different periods: the prehistoric period, the ancient world, the renaissance and the contemporary diplomacy.³³ It is important to examine the evolution in terms of each of these periods. Each of these periods is examined in the subsequent paragraphs.

With regard to the prehistoric period, a number of scholars have argued that the special privileges and immunities that were enjoyed by government representatives were not strictly based on law as they are today.³⁴ Such scholars have established the nexus between the consecrated positions of emissaries and religious belief systems and practices. Notably, different scholars agree that the influence of religion on diplomatic immunity pervades all known past civilizations.³⁵ The religious groups included among others Christianity, Islam and Buddhism. Nonetheless, some scholars have claimed that, even though religion had a significant influence on the development of diplomatic immunity, it cannot claim a dominant role, mainly because there were other secular influences.³⁶ Research further shows that various civilizations of the past confirm and support the universality of the early practices of diplomatic relations and inviolability of diplomatic representatives, although at different levels.³⁷

Evidence reveals that during the early parts of the historic period, there were some forms of elementary diplomatic activities and inviolability of diplomatic envoys, the roots of which

²⁹ Derek Drinkwater, *Sir Harold Nicolson and International Relations: The Practitioner as Theorist* (New York, NY: OUP Oxford, 2005), 99; see Dirk Messener and Silke Weinlich, *Global Cooperation and the Human Factor in International Relations* (New York, NY: Routledge, 2015), 225.

³⁰ Ibid.

³¹ Ibid.

³² Manfred F. Boemeke, Gerald and D. Feldman, *The Treaty of Versailles: A Reassessment After 75 Years* (Cambridge, UK: Cambridge University Press, 1998) 194.

³³ Jovan, Kurbalija and Dietrich, Kappeler, *Evolution of Diplomatic Privileges and Immunities*, 2008. Available <http://www.diplomacy.edu/resources/general/evolution-diplomatic-privileges-and-immunities>. Accessed on 11 June.

³⁴ Martin Uzochukwu Gasiokwu, *International Law and Diplomacy: Selected Essays* (Indiana: Chenglo Limited, 2004), 6.

³⁵ Muhammad-Basheer A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories* (London, UK: Palgrave Macmillan, 2016)

³⁶ See Jacob Bercovitch, Victor Kremenyuk and William Zartman, *The SAGE Handbook of Conflict Resolution* (SAGE, 2008), 39.

³⁷ Linda Frey and Marsha Frey, *The History of Diplomatic Immunity* (Ohio, OH: Ohio State University Press, 1999) 292.

have been traced to the Greeks and Romans, among others.³⁸ Nonetheless, research further points to the possibility that the prehistoric society established and developed their own approaches to declaring war against enemies, resolving disputes and negotiating trade among themselves and with members of other societies.³⁹ In order to achieve successful trade negotiations and to resolve disputes, the communities relied on the use of intercommunity messengers who served as envoys.⁴⁰ In this respect, the messengers had to be accorded certain freedom, personal immunities and safety in order to carry out their tasks effectively. Therefore, it is remarkable that such early diplomatic relations underline the development of the current diplomatic and consular relations and immunities. The evolution of such relationships has resulted in the increasing formalization of inter-societal relations.

Following the prehistoric period was the ancient world. During this period, literature records from the ancient Near East were the first recorded indications regarding the granting of privileges and immunities and they seemed to have been expressed in the correspondences between two kings of the times, Ramses II and Hattusili III.⁴¹ The correspondences were in the form of what were described as the Amarna letters.⁴² The letters were mainly used as diplomatic correspondences between Egyptian Pharaohs such as Ramses and representatives of other kingdoms like Hattusili III.⁴³ Further, it is evident that the said letters were the main sources of information pertaining to diplomatic relations, which also acknowledged the right of envoys to immediate and unimpeded passage through a territory of another kingdom.

With respect to the ancient period in India, studies have shown that rulers did not maintain permanent representatives.⁴⁴ Instead, they depended on representatives who delivered their messages to other rulers and on negotiators who represented their positions during negotiations.⁴⁵ Such negotiations were referred to as “plenipotentiaries” and they were authorized to carry out negotiations and to make changes to agreements on behalf of their principals or masters. Notably, the messengers and negotiators enjoyed some levels of privileges and immunities.⁴⁶

³⁸ Ibid.

³⁹ Muhammed-Basheer, *supra* note 35.

⁴⁰ Ibid.

⁴¹ Marc Van De Mieroop, *The Eastern Mediterranean in the Age of Ramesses II* (Winchester, Hampshire: John Wiley & Sons, 2009), 110.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Adam Watson, *Diplomacy: The Dialogue between States* (New York, NY: Routledge, 2013), 81.

⁴⁵ Ibid.

⁴⁶ Ibid.

Based on other available evidence, the ancient Greeks practiced international relations based on the concept of *proxenoi*, which had the connotation of hospitality.⁴⁷ *Proxenoi* was used to refer to a citizen of an ancient Greek city who was appointed and sent from another state to take charge of the interests of the sending state. Even though it related to diplomacy, it was considered a permanent representation, because, rather than represent a kingdom or a territory, it was meant to represent a city or a community within the territories.⁴⁸ Interestingly, the English word “proxy” derives from the concept of *proxenoi*. Importantly, the concept of *proxenoi* is also considered to be among the elements that formed the foundation diplomatic privileges and immunities in the contemporary international relations as it is currently understood.⁴⁹

Rome played a significant role in the development of diplomatic relations and practices. According to available literature evidence, diplomacy was a significant factor in Rome’s quest to establish its supremacy in Italy, during the third and fourth century and during the Punic Wars with Carthage, the wars of which took place in the same period.⁵⁰ Just like other states in the prehistoric period, Rome did not maintain permanent representatives or envoys.⁵¹ Instead, it made use of legations in its diplomatic relations with other states. A legation is considered a diplomatic representative.⁵²

The penultimate period of the history of diplomatic privileges and immunities was the renaissance diplomacy. In the context of the renaissance diplomacy, the first organized diplomatic relations were established in the Italian city states.⁵³ The city states had permanent diplomatic missions and other elements that can be associated with the contemporary diplomacy.⁵⁴ Notably, the literature evidence reveals that the key elements of the diplomatic relations in the Italian city states were privileges and immunities.⁵⁵ Manifestly, the history of the institution of permanent diplomatic and consular missions can be traced to the renaissance diplomacy. From the renaissance diplomacy, there is now the modern diplomacy.

⁴⁷ Nigel Wilson, *Encyclopedia of Ancient Greece* (New York, NY: Routledge, 2013), 232.

⁴⁸ Ibid.

⁴⁹ Lynette G. Mitchell, *Greeks Bearing Gifts: The Public Use of Private Relationships in the Greek World, 435-323 BC* (Cambridge, UK: Cambridge University Press, 2002), 32.

⁵⁰ See Michael P. Fronda, *Between Rome and Carthage: Southern Italy during the Second Punic War* (Cambridge, London: Cambridge University Press, 2010), 49; see Kathryn Lomas, *Rome and the Western Greeks, 350 BC - AD 200: Conquest and Acculturation in Southern Italy* (New York, NY: Routledge, 2005), 2.

⁵¹ Matthew P. Canepa, *The Two Eyes of the Earth: Art and Ritual of Kingship Between Rome and Sasanian Iran* (California: University of California Press, 2009), 129.

⁵² Ibid.

⁵³ Daniela Frigo, *Politics and Diplomacy in Early Modern Italy: The Structure of Diplomatic Practice, 1450-1800* (Cambridge, UK: Cambridge University Press, 2000), 25.

⁵⁴ Ibid.

⁵⁵ Ibid.

The historical development of diplomacy has ended in the period of modern diplomacy, which prevails among sovereign states currently. The development of the permanent diplomatic and consular missions has happened rapidly in the post renaissance period. Markedly, France was the first state to establish the first ministry of foreign affairs in 1626.⁵⁶ The same ministries were later to be established by various states around the world to take care of their interests in foreign states. The increasing formal, permanent diplomatic relations between and among states around the world, necessitated the need for the Congress of Vienna in 1815, of which the main objective was to create the first formal institutional framework regarding modern state diplomatic relations.⁵⁷ Accordingly, the Congress of Vienna came up with different categories of diplomatic representatives, which included *charges d'affairs*, minister plenipotentiaries, ambassadors and papal legates among others.⁵⁸ It is important to note that the Congress of Vienna was one that was constituted by ambassadors and representatives of states from Europe and it was held between 1814 and 1815.⁵⁹ The Congress essentially codified the already existing customary diplomacy law, which can be corroborated by the fact that, prior to the modern diplomacy period, there were already diplomatic relations, privileges and immunities among different states, as has been established above.

Currently there are two main sources of law on diplomatic and consular relations. The first one is the customary international law. The second source includes treaties; the first treaty is the 1961 Vienna Convention on Diplomatic Relations (the 1961 Vienna Convention), which primarily deals with the modern diplomatic privileges and immunities. It provides for the framework within which diplomats of independent, sovereign states relate with each other. The second treaty is the 1961 Vienna Convention, which spells out the privileges and immunities that diplomatic missions enjoy to make it possible for them to undertake their duties and responsibilities without the fear of criminal or civil actions against them or coercion or persecution by the government of host states. The provisions of the 1961 Vienna Convention are regarded as the backbone of the contemporary international diplomatic relations.⁶⁰ The UN Conference on Diplomatic Intercourse and Immunities concluded and adopted the 1961 Vienna Convention on the 14th April 1961. In addition to the Convention, the Conference further adopted a number of op-

⁵⁶ Royce J. Ammon, *Global Television and the Shaping of World Politics: CNN, Telediplomacy, and Foreign Policy* (Jefferson, NC: McFarland, 2001), 38.

⁵⁷ Tim Chapman, *The Congress of Vienna 1814-1815* (New York, NY: Routledge, 2006), 60; Boleslaw Adam Boczek, *International Law: A Dictionary* (Lanham, ML: Scarecrow Press, 2005), 47.

⁵⁸ Gandhi Jee Roy, *Diplomacy in ancient India* (New Delhi: Janaki Prakashan, 1981).

⁵⁹ Ibid.

⁶⁰ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (New York, NY: Oxford University Press, 2016), 431.

tional protocols: Optional Protocol deals with the subject of the acquisition of nationality; the Optional Protocol Concerning the Compulsory Settlement of Disputes; and the Final Act, including four resolutions that are annexed to the Act. Currently, about 190 states have ratified it.⁶¹

The other important diplomatic relations are consular representations. Even though the diplomatic relations, immunity and privileges have developed over time and in different historical periods, consular relations have mainly been in the context of trade and commerce; this is what differentiates the functions of diplomats and consuls. Studies have shown that the historical origin of consular functions is generally linked to the development of international trade and the pursuit of economic interests of the various states.⁶² According to different researchers, the root of consular relations among states goes back to ancient Greece. Nonetheless, the researchers have noted that it was in the twentieth century that the formal concept of consular relations emerged and developed to its current structure, which has gradually grown to become relatively complex.⁶³ Remarkably, since international trade initially took place through the sea; that is, maritime trade, most consular relations were related to sea trade and commerce. In this respect, the initial codes regarding consular functions were developed as maritime compilations.⁶⁴

During the sixteenth and seventeenth century, consular relations developed further, particularly alongside the development of diplomacy in Europe. Such a development resulted in the first rules guiding consular relations; the *Ordinance de la Marine* 1681, which provided mainly for and explained consular services and the legal statuses of consuls.⁶⁵ In 1949, the United Nations International Law Commission started a serious consideration of consular privileges and immunities as an important agenda of its future codification of international laws.⁶⁶ In its quest to achieve codified consular relations laws, it relied largely on *jus cogens*.⁶⁷ It also considered borrowing from national and international laws relating to trade and commerce.⁶⁸ Evidently, with the growing international trade and consular relation, the UN felt a pressing need to adopt an appropriate international convention. In response to that need, the UN Conference on Consular Relations convened a meeting in Vienna between 4 March and 22 April 1963. Representatives

⁶¹ Ibid.

⁶² Ferry de Goey, *Consuls and the Institutions of Global Capitalism, 1783–1914* (New York, NY: Routledge, 2015), 12.

⁶³ Ibid.

⁶⁴ J. P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800, Volume 1; Volume 8* (Uitgeverij Verloren, 1999), 246.

⁶⁵ UNILC, *Yearbook, Volume 2* (1958).

⁶⁶ Anthony Aust, *Handbook of International Law* (Cambridge, UK: Cambridge University Press, 2010), 108.

⁶⁷ Chapman, *supra* note 57, 44.

⁶⁸ Ibid.

from ninety-nine countries attended the meeting. On 24 April 1963, the UN Conference finally concluded and adopted the 1963 Vienna Convention on Consular Relations (the 1963 Vienna Convention).⁶⁹

The Conference had adopted two related protocols: the 1961 Optional Concerning Compulsory Settlement of Disputes⁷⁰ and the 1961 Optional Protocol concerning Acquisition of Nationality.⁷¹ Notably, the Convention and the two optional protocols entered into force on 19 March 1967. Just as the 1961 Vienna Convention addresses the issues of diplomatic privileges and immunities, the 1963 Vienna Convention addresses the same issues with respect to consular privileges and immunities. The 1963 Convention is the current international legal instrument dealing with matters pertaining to consular relations between and among sovereign states. However, it is important to re-emphasize that the privileges and immunities that are granted to consuls are not as elaborate as those that are granted to diplomatic officials and heads of states. This discrepancy is discussed later.

Background of State Immunity

State immunity is alternatively known as sovereign immunity. It is a principle of international law, which has been incorporated into the national laws of many countries. It is primarily based on sovereign equality. Even though it is a principle of international law, state immunity is applied at the state level, based on the laws of the forum state. This means that forum states determine the issues of state immunity.⁷²

Therefore, the history of state immunity can be traced to state practice, with one of the most prominent cases being that of *The Schooner Exchange v McFaddon*,⁷³ in which the issue was about the jurisdiction of the American courts over foreign military vessels. The facts of the case were that the Schooner Exchanges had commenced its voyage from Baltimore in Maryland to travel to San Sebastian in Spain. While on its way, Napoleon Bonaparte ordered seize it. It was subsequently converted into a warship under the name Balaou. When the ship was forced to dock in Philadelphia due to damages arising out of a storm into which it had run, MacFaddon and Greenham filed a case in the district court asking for an order to seize the ship. However, the district court ruled that it lacked jurisdiction in the matter.⁷⁴ MacFaddon and Greenham appealed to the circuit court, which reversed the decision of the lower court. Subsequently, the Supreme

⁶⁹ *Treaty Series*, vol. 596, p. 261.

⁷⁰ *Treaty Series*, vol. 500, p. 241.

⁷¹ *Treaty Series*, vol. 500, p. 223.

⁷² Toleikyte Neringa, *The Concept of State Immunity and The Main Challenges*, (Vilnius University), 346-347.

⁷³ *The Exchange v. McFaddon*, U.S. Supreme Court, 11 U.S. 116 (1812).

⁷⁴ *Ibid.*

Court reinstated the decision may the district court, reasoning that the US lacked jurisdiction over the dispute.⁷⁵ According to the Supreme Court, even though a sovereign state exercises absolute and exclusive jurisdiction within its territory, pursuant to customary international law, such a jurisdiction is assumed to have been waived in cases such as relating to foreign sovereigns and their diplomatic agents.⁷⁶ In such a scenario, the court noted that the sovereigns and their diplomatic agents are generally free from the jurisdictions of the receiving state. The Supreme Court's ruling is that a state may waive its jurisdiction over foreign states and their diplomatic representatives. Since, most countries had been waiving their jurisdictions over other states, the doctrine of state immunity started developing.⁷⁷

However, scholars have acknowledged that the above case is just one of the state practices that have led to the development of customary international law regarding state immunity. Principally, the judicial practices in national courts are the roots of state immunity. Importantly, the development of state immunity is underlined by the practice of reciprocity between and among states.⁷⁸ Through state practices, in which states apply the rule of comity in their dealings with one another, comity refers to a principle in which one state extends certain courtesies to other states with the expectation that those other states will reciprocate. One of such courtesies is the exception of foreign states from domestic jurisdiction.⁷⁹ Such practices, when observed by judicial organs of states, result the development of customary international law. State sovereignty continues to be practiced among states in their international relations. The next chapter examines two main types of immunities: functional and absolute immunities.

III) Functional and Absolute Immunity

As noted earlier in this paper, immunity under international law refers to a doctrine that enables certain persons to avoid criminal liability before courts in a foreign state. Such persons are often charged with certain functions of the sending states. There are two main types of immunities under both customary international law and treaty law. Treaty law basically codifies customary international law, which is composed of long periods of state practices. These are the functional and absolute immunities, which are granted to states and their high-ranking officers. They are respectively known in Latin as *immunity ratione materiae* and *immunity ratione perso-*

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Benedetto Conforti and Francesco Francioni, *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, 1997), 409.

⁷⁸ Gamal Gadr, *State Immunity: An Analytical and Prognostic View* (New York, NY: Springer Science & Business Media, 2013), 102.

⁷⁹ Ibid.

nae. Personal immunities are often absolute during the subsistence of an official's tenure. Before assessing who enjoys these immunities, it is important to analyse the nature of each of them.

Functional Immunity

Functional immunity as known in Latin is *immunity ratione materiae*. Its existence of functional immunity is based on both customary international law and treaties.⁸⁰ This kind of immunity is granted to persons who undertaken certain state functions; such persons are always officials of foreign states.⁸¹ Evidently, persons who commit certain acts on behalf of a state are afforded functional immunity and the immunity continues even after the persons cease to hold the office through which they act on behalf of the state.⁸² Essentially, functional immunity is with respect to official acts and not the status of the person so protected.

The granting of functional immunity has been justified on a number of grounds. First, it is based on the concept of the sovereign equality of states.⁸³ Sovereign equality is stated in Article 2 of the Charter of the United Nations.⁸⁴ The concept implies that every independent, sovereign state possesses same rights under international law and, hence, no state may claim jurisdiction over another.⁸⁵ This notion is best explained in the doctrine *par in parem non habet imperium*, a Latin term meaning that, "An equal has no power over an equal".⁸⁶ Second, the development of immunity is to make it possible for foreign state officials to undertake their public duties without being deterred by the exercise of a foreign court's criminal jurisdiction, which is in most cases the receiving state of a diplomat.⁸⁷ Third, functional immunity has been justified on the ground of functional necessity.⁸⁸ In this respect, the granting of the immunity is simply necessary to enable foreign state officials to perform the functions with respect to which they represent their sending states. Fourth, this kind of immunity is justified by the fact that the structure of international law has, for a long time, only recognized and admitted the collective respon-

⁸⁰ See the 1961 Vienna Convention on Diplomatic Relations.

⁸¹ Ademola Abass, *Complete International Law: Text, Cases, and Materials* (New York, NY: Oxford University Press, 2014), 286.

⁸² Ibid.

⁸³ Cassese, *Supra* note 10, 669.

⁸⁴ Signed on 26 June 1945 and came into force on 24 October 1945.

⁸⁵ Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (New York, NY: Springer Science & Business Media, 2008), 272.

⁸⁶ Winston P. Nagan and Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity; Peremptory Norms Of International Law, The UN Charter, And the Application of Modern Communications Theory*, (University of Florida Levin College of Law), 2013, 3.

⁸⁷ Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (New York, NY: Springer Science & Business Media, 2013), 89.

⁸⁸ Ola Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law* (Martinus Nijhoff Publishers, 2007), 134.

sibility of states, meaning that international law has often not considered an individual person as a subject of international law.⁸⁹

According to Article II of the *Institut de Droit International's* Resolution on the Immunity from Jurisdiction of the States and of Persons Who Act on Behalf of the State in case of International Crimes⁹⁰ has stipulated that immunities are granted to ensure that there is an orderly allocation and exercise of jurisdiction with respect to international law in proceedings regarding the states and to respect the sovereign equality of States. Further, the Resolution states that the immunities are meant to respect the sovereign equality of states and to allow the effective performance of the functions of persons who act on behalf states.⁹¹ The definition of international crimes as offered by the *Institut de Droit International* encompasses the ones that are explained under the Rome Statute of the International Criminal Court.⁹²

The common understanding is that any action that is performed by a person in an official state capacity is, in reality, attributable to the state he or she represents.⁹³ Therefore, because an act that has been committed by a person in an official capacity is attributable to the state, the granting of functional immunity is a mechanism through which liability is attached directly to the state, so that the person supposedly acting on behalf of his or her state is not held responsible, if such an act is in an official capacity. Nonetheless, human rights advocates have often argued that not all acts should be attributed to the state. They contend that acts of international crimes should be the liability of individuals.⁹⁴ With such an argument, international human rights law limits the principle of functional necessity, which is the basis on which functional immunity is granted. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ACICTFY) clearly articulated the position as to functional immunity in the case of *Prosecutor v Blaskic*⁹⁵ by arguing that state officials are simply instruments of the state and that the actions they commit in their official capacities are attributable to the state. The ACICTFY further explained that such persons are not to be subjected to sanctions and punishments for the acts that are not private but are done on behalf of the state that they represent and that state officials are

⁸⁹ Ibid.

⁹⁰ *Napoli Session-2009*, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Third Commission (Rapporteur: Lady Fox), Justitia Et Pace Institut De Droit International.

⁹¹ Ibid.

⁹² See Part 2 of the Rome Statute of ICC.

⁹³ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge, UK: Cambridge University Press, 2010), 533.

⁹⁴ Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, 2008), 588.

⁹⁵ Case No. IT-95-14-A ICTY Appeals Chamber 29 July 2004 para.41 -72.

not to be subjected to the consequences of such acts that are attributable to the states on behalf of which they work. The ACICTFY noted that such persons enjoy functional immunity, which is a creation of the customary international law as developed between the eighteenth and the nineteenth century and international treaties as adopted by the UNGA.⁹⁶

However, it is important to point out that the immunity that is extended to foreign state officials is based on state immunity, meaning that without state immunity, such persons may not enjoy functional immunity. State immunity is necessary to prevent acts of another state being adjudicated in the courts of another state. The English Court of Appeal undoubtedly captured this notion in the case of *Zoernsch v Waldock*.⁹⁷ According to the court, a foreign sovereign government can only act through appointed representatives, except personal sovereigns. The court further stated that the immunity that is granted to a state would be unrealistic unless it also extended to its representatives in relation to acts that those representatives commit on the state's behalf.⁹⁸ The court concluded by stating that, to sue persons acting in representations of a state is to sue their governments directly, which implies the violation of not just state immunity, but also the principle of sovereignty equality as specified under Article 2 of the Charter of the United Nations (the UN). Therefore, the significance of functional immunity is to operate as jurisdictional or technical restriction to courts from exercising judicial proceedings with regard to acts that have been committed by officials of foreign officials on behalf of their states.⁹⁹

The scope of functional immunity covers only acts that are committed in an official and not personal capacity.¹⁰⁰ Accordingly, foreign state representatives are tasked with specific responsibilities by their sending governments. In that case, the representatives act exclusively as organs of their governments.¹⁰¹ The notion is that, where their actions contradict official functions, the immunity ceases to apply to them and that they should become amenable to the jurisdiction of the hosting state as to acts not conforming to the laws of the state. Nonetheless, the representatives enjoy the immunity even after office, only in relation to acts that conform to official state functions.¹⁰² Based on the foregoing facts, it is clear that functional immunity under international law is not absolute, specifically if acts are only in the interest of the representatives and not the sending state. The immunity does not cover acts committed at personal level.

⁹⁶ Cassese, *supra* note 10, 236.

⁹⁷ K.R. Simmonds (1964), *The Duration of International Jurisdictional Immunities*, ICLQ, 13, pp1433-1441.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Cassese, *supra* note 10, 88.

¹⁰¹ Cryer, *supra* note 93, 533.

¹⁰² Ibid.

It is important to note that functional immunity is only with respect to the jurisdiction of the hosting state; the immunity does not bar the sending state from instituting either criminal or civil prosecution against representatives it sends to other states. Article 31(4) of the 1961 VCDR explains that the diplomatic representatives having immunity can still be prosecuted by their sending states, even though such officials as presidents are often exempted from both civil and criminal prosecutions through domestic legislations.¹⁰³

Absolute Immunity

Under international law, a state official or government representative can be granted either absolute or qualified immunity. On one hand, absolute immunity provides a person with the right to be free from all legal consequences resulting from the burden of the need of appearing before the courts of a foreign country to answer charges. On the other hand, qualified immunity only applies where a state official or government representative acts within the scope of his or her duties, act objectively and in good faith, and act in ways that unreasonably violate unequivocally established laws of the hosting countries. However, Article 31(1) of the 1961 VCDR expressly stipulates that a diplomatic representative enjoys absolute immunity with respect to the criminal jurisdiction of a receiving state.¹⁰⁴ From the provision, it is clear that, as a general rule, foreign state officials enjoy absolute immunity with regard to criminal liabilities committed within receiving states and in relation to international crimes, while the same officials enjoy qualified immunity in relation to civil jurisdiction as evidenced in Article 31(1)(a)-(c) of the Convention; the submission to the civil jurisdiction of foreign state is only undertaken if the civil wrongs outlined in Article 31(1)(a)-(c) are performed in private capacities.¹⁰⁵

Persons Enjoying Functional and Absolute Immunity

Under international law, a number of foreign state officials enjoy the right of functional and absolute immunity. Functional immunity as a right is enjoyed by different categories of state officials in varying degrees. Without a doubt, the first category includes diplomatic agents of a foreign state; this is confirmed in Article 31(1) of the 1961 VCDR, the provisions of which state that such agents have absolute immunity from the criminal jurisdiction of the receiving state.¹⁰⁶ The provision further stipulates that such an official shall also enjoy immunity with regard to civil proceedings to the extent specified under Article 31(1)(a)-(c) of the Convention, as has been discussed previously. Heads of states, head of governments, ministers for foreign affairs, consti-

¹⁰³ *Treaty Series*, vol. 500, p. 95.

¹⁰⁴ *Ibid.*

¹⁰⁵ See the 1961 Vienna Convention on Diplomatic Relations.

¹⁰⁶ *Ibid.*

tute the other category of foreign officials who enjoy functional immunity from foreign criminal jurisdictions. The foregoing state officials enjoy both personal and functional immunity based on customary international laws.

A number of cases exist to underline the inviolability of the aforementioned state officials with respect to criminal jurisdictions of receiving states, one of which is the *Arrest Warrant Case*¹⁰⁷ in which one of the issues to be discussed was whether Belgium had violated the Congolese Minister for Foreign Affairs' right to absolute immunity as recognized under international law. The ICJ ruled that, indeed, it has violated the principle of absolute immunity as it applied to foreign state officials. While ruling on the case, the ICJ came up with four conditions under which a minister or former minister can be prosecuted for criminal acts without considering the immunity:¹⁰⁸ such a minister can be prosecuted under his or her own country's laws, given that international immunities provided to ministers are not recognized under national laws; if the sending country waves the immunity of such a minister, he or she can be prosecuted in courts of a foreign country; when he or she ceases to be a foreign minister, the person can be prosecuted for private acts he or she committed during the subsistence of tenure¹⁰⁹; finally, he can be prosecuted before a competent international tribunal, as will be seen later.

As to presidents and heads of state, the doctrine of state responsibility provides that their actions are attributable to the state, so that the state is the entity that takes the responsibility for actions they have committed with respect to foreign state and international law.¹¹⁰ Importantly, in the absence of any treaty binding on the parties, customary international law recognizes that presidents and heads of states are entitled to functional and absolute immunities with respect to criminal jurisdictions. A number of decisions that have been by some countries have shown a trend in which heads and presidents of states enjoy absolute immunity before courts of foreign jurisdictions. The International Court of Justice, in the *Arrest Warrant Case*, confirmed the immunity of heads of states when it stated that heads of state were among the high-ranking state officers who enjoy jurisdiction immunity in other foreign states.

Under Article 37 of the 1961 VCDR, the family members of the diplomatic officials of foreign states enjoy the same privileges and immunities that the diplomatic officials enjoy under Article 29, so long as they are not nationals of the receiving state. According to the provision,¹¹¹

¹⁰⁷ *Arrest Warrant case*, *supra* note 8.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Alebeek*, *supra* note 14,144.

¹¹¹ Article 29 of the 1961 Vienna Convention on Diplomatic Relations.

diplomatic agents are inviolable and shall not be subjected to any form of arrest or detention.¹¹² Given these provisions, it can be concluded that families of foreign diplomatic officials are also entitled to absolute immunities in receiving states and that they need the same protections that are espoused under Article 29 of the Convention.

Consuls are also entitled to immunities under international law. However, it is important to note that the privileges and immunities that the consuls and other consular officials enjoy are limited, as compared to the ones enjoyed by diplomatic officials and heads of states and governments. In this respect, the privileges and immunities to which consuls are entitled are found under Chapter II, Section II of the 1963 VCCR. Under Article 41(1) of the Convention, consuls are not subject to arrest and detentions pending trials, except for cases of grave criminal conducts; another exception is that such officials can be prosecuted pursuant to a decision that has been made by a competent judicial authority of the receiving state.¹¹³ In Paragraph 2 of Article 41, the Convention states that consular officials shall not be committed to jail or be held liable for any other nature of restriction as to their personal freedom, except in the execution of judicial decisions and in situations of grave crimes as specified in Paragraph 1.¹¹⁴

Based on the above provisions, it is clear that consular officials enjoy immunity only to a limited extent, especially with regard to criminal conducts that they may commit at a personal level; this means that consular officials cannot be held criminally liable for the violation of the criminal laws of the receiving state, if such a violation results in the course of performing their official functions. In point is the *Re Rissmann Case* (Corte di Cassazione, 1972)¹¹⁵, the facts of which are that a German consular official in Italy had issued a passport and other travel documents for a minor resident in Italy and further helped her to leave Italy to be reunited with her father, who was a German national residing in Germany. Moreover, under the relevant German law, the minor was considered a national of Germany and, hence, a German court had granted her father guardianship rights. On the contrary, under the relevant Italian law, she was an Italian national and by that dint, the Italian court had granted to her mother, a resident of Genoa, guardianship rights. As a result, the Italian authorities instituted criminal proceedings against the German consular official. In objecting to the proceedings, the German embassy in Rome advanced the argument that the consul had acted in the exercise of his official functions. The court before

¹¹² Ibid.

¹¹³ Article 41(1) of the 1963 Vienna Convention on Consular Relations.

¹¹⁴ See 1963 Vienna Convention on Consular Relations.

¹¹⁵ *Re Rissmann Case*, Italy, 1970, (1973) 9 RDIPP 121. (as cited in Alebeek, 2008).

which the consul was tried ruled that he had acted within the confines of his proper official functions and, hence, he had the right to functional immunity.¹¹⁶

Unlike diplomats under the 1961 VCDR, consuls can be subjected to court proceedings to answer for grave crimes and on the advice of a competent court of a receiving state. However, it is clear that they only enjoy functional immunity in relation to their consular functions, as stipulated in the 1963 VCCR, so long as they perform their functions within their mandates and according to the provisions of the 1963 VCCR.¹¹⁷

Limitations to Functional and Absolute Immunities

With respect to functional immunity, the provisions of the 1961 VCDR stipulates that, when the functions of a person to whom the immunity is granted terminates, such an immunity “shall normally cease”¹¹⁸ the moment he or she exits the country, or “on expiry of a reasonable period in which do to so.”¹¹⁹ The most part of the provision applicable to functional immunity is that the person having the immunity in relation to acts performed on behalf a state shall continue to enjoy that immunity, even after leaving the office. This means that functional immunity continues to protect former high ranking state officials who enjoyed it during his or her tenure.

However, foreign state representatives enjoy absolute immunities only to the extent that they are neither withdrawn nor their immunity waived by their sending states. Some legal scholars hold the view that absolute immunity that is granted to diplomatic representatives and other high ranking state officials in relation to criminal liability is only procedural in nature and does not extinguish any underlying substantive liability under the law.¹²⁰ The implication of the foregoing exposition is that, despite having committed a criminal offense, a presiding court must discontinue the case immediately it is satisfied that the accused presented before it enjoys absolute immunity from its jurisdiction. However, such criminal proceedings are only suspended for the duration of the period within which the foreign state representative is entitled to absolute immunity where international crimes are involved.¹²¹ Essentially, such immunity only suspends the proceedings, but does not render them null for purposes of future prosecution, when the person will no longer be entitled to such immunity. There are many examples in which different

¹¹⁶ Alebeek, *supra* note 14, 119-121.

¹¹⁷ See 1963 Vienna Convention on Consular Relations.

¹¹⁸ Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations.

¹¹⁹ Ibid.

¹²⁰ Benedetto Conforti and Luigi Ferrari Bravo, *The Italian Yearbook of International Law, Volume 14* (Milano: Dott. A. Giuffrè, 2004).

¹²¹ Ibid.

jurisdictions have held that the termination of such immunity avails foreign state representatives for criminal prosecutions in a receiving state.

One of the examples is the England Court of Appeal case of *Empson v Smith*,¹²² in which the court ruled that diplomatic immunity does not absolve one from legal liability, but only protects him or her from criminal suits. The ruling meant that, once diplomatic immunity is terminated in whatever circumstances, any pending criminal action could be revived against a foreign state official; this can be done whether a criminal offense was committed before or during the subsistence of diplomatic immunity. Essentially, the loss or lapse of immunity immediately removes the procedural bar and enables the courts of the host state to exercise their jurisdiction with regard to the substantive criminal liability of the foreign state official. The same ruling was held in the Indian case of *Dickinson v Del Solar*,¹²³ in which the court also ruled that, even though a criminal prosecution could not be proceeded against Del Solar, who was a diplomatic agent and who enjoyed absolute immunity by virtue of that position, a criminal prosecution could be instituted against him once he ceased to enjoy such an immunity.¹²⁴

Importantly, diplomatic immunity can be waived by the sending state. Article 32(1) of the 1961 VCDR stipulates that a sending state can waive the diplomatic immunity of its diplomatic agents or other persons who may also be enjoying the same immunity as specified under Article 37 of the Convention. An example of such a scenario is the United States case of *Rex v A.B.*¹²⁵ In this case, a clerk working at the United States Embassy was in England had committed a crime while enjoying diplomatic immunity. Immediately he was dismissed from employment, the English judicial authorities arrested, prosecuted and convicted him of the crime. The foregoing case is an instance in which a receiving state institutes a criminal proceeding against a foreign state official whose immunity had ceased.¹²⁶

A receiving state may declare a foreign state official *persona non grata*, meaning that such a person is no longer wanted in the territory of the receiving state. It is a sanction that is established in the customary international law.¹²⁷ Being declared *persona non grata* by a receiving state might expose a foreign state official to criminal prosecution. In such a scenario, pursuant to Article 9(1) of the 1961 VCDR, a receiving state is entitled to reject without providing any explanation the head of the mission or any official of the mission and inform the sending country

¹²² *Empson v. Smith*, [1966] 1 Q.B 426, *Court of Appeal, England*.

¹²³ *Dickinson v. Del Solar*, [1930] 1 K.B 376 (1930), *King's Bench Division, England*.

¹²⁴ *Ibid.*

¹²⁵ *Rex v. A.B.* [1941], 1 K.B. 454 (1941), *Court of Criminal Appeal, England*.

¹²⁶ *Ibid.*

¹²⁷ Przemyslaw Saganeck, *Unilateral Acts of States in Public International Law* (Boston, MA: BRILL, 2015), 300.

that such persons are not needed in the country. Acting under the foregoing provision is essentially declaring such persons *persona non grata*. In such a case, the provision requires that the sending state must either recall or terminate the functions of the person so declared *persona non grata*, upon which the person ceases to enjoy any diplomatic privileges and immunity.¹²⁸ Consequently, the sending state may exercise its criminal jurisdiction to arrest and prosecute the person, if he or she is accused of a criminal offense; this becomes possible if the accused is still within the physical jurisdiction of the receiving state. Otherwise, the sending state may have to rely on repudiation, if possible. Important to note is the possibility of a receiving state declaring a foreign diplomatic official *persona non grata* if he or she habitually breaks the laws of the country.¹²⁹ However, the practice of declaring foreign state representatives *persona non grata* is rare, unless the representatives are involved in serious violation of the law of the receiving country.

From the above expositions judicial decisions, it is clear that foreign diplomatic officials enjoy absolute immunity based on certain conditions: their diplomatic immunities have not been waived by their sending states; their diplomatic immunities have not ceased due to end of their employment contracts; and they have not been declared *persona non grata* while still within the physical jurisdiction of the receiving state.

IV) International Crimes

Introduction

This chapter defines the concept of international crimes and analyses the historical origin of this type of crimes. It proceeds to discuss the various types of international crimes as defined under different international legal instruments. In order to understand the development of international criminal law, it is also important to consider how international criminal tribunals have developed to the point of having the International Criminal Court, which is the first permanent international criminal court. In this case, the chapter discusses the progression of the development of international criminal tribunals, right from the Nuremberg Trials to the establishment of the International Criminal Court under the Rome Statute.

¹²⁸ Article 9(1) of the 1961 Vienna Convention on Diplomatic Relations.

¹²⁹ Bruce Zagaris, *International White Collar Crime: Cases and Materials* (Cambridge, UK: Cambridge University Press, 2010), 248.

The Definition and Background of International Crimes

International crime can be defined to include the kind of crimes that affect the peace and safety of more than one sovereign state or to include crimes the nature of which are so reprehensible that the intervention of international agencies in terms of investigations and prosecutions thereof are justified and necessary; they are crimes that arise under international criminal laws.¹³⁰ Most of the international crimes that are committed around the world are in the contexts of armed conflicts and civil wars.¹³¹ International crimes have necessitated the establishment and development of international criminal tribunals to help in dealing with crimes that states cannot or have deliberately refused to prosecute under domestic laws. It is important to note that dealing with international crimes is the crux of the international criminal justice system, which has become a very significant factor in the international legal order.

The exclusive subjects of the classical international law were states and not individual persons.¹³² Therefore, the introduction of criminal aspects and norms into the international law necessitated that an individual natural person must be recognized as a subject of international law so that he or she can be held responsible for crimes that are of a great concern to the international community. Before then, only states could bear the responsibilities and claim rights under the international law.¹³³ However, with the advent of crimes that shock the conscience of humanity, such as the experiences of the World War I and World War II, it has become increasingly necessary to grant individual persons rights and duties in the context of the wider concept of international law. With that recognition, the development of the international criminal justice system has become inevitable. One of the objects of the international criminal justice system is to bring individual criminal liabilities within the purview of the international law. In this case, the Versailles Peace Treaty of 28 June 1919 was the first attempt to establish the concept of individual responsibility in the context of international crimes (Articles 227-230), following which the events of the World War II that ended in 1945 necessitated the establishment of an international criminal tribunal to try and bring to justice those who participated in criminal activities that shocked the conscience of mankind.¹³⁴

¹³⁰ Damgaard, *supra* note 85, 12.

¹³¹ *Ibid.*, 25

¹³² Kirsten Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (New York, NY: Routledge, 2013), 2.

¹³³ *Ibid.*

¹³⁴ Marc Weller, Alexia Solomou and Jake William Rylatt, *The Oxford Handbook of the Use of Force in International Law* (New York, NY: OUP Oxford, 2015), 50.

As a result, the Charter of the International Military Tribunal at Nuremberg was established in 1945 (The 1945 IMT Charter) to work on an *ad hoc* basis.¹³⁵ Article 1 of the IMT Charter established the International Military tribunal, the purpose of which was to pursue just and prompt prosecutions of those who bore the greatest responsibility for war crimes that took place in the European context without regard to geographical limitations. More particularly, the infamous Nuremberg Trials, which were based on the provisions of the IMT Charter, was meant to bring to justice the Nazi officials who had committed grievous crimes that were classified as either crimes against humanity or crimes against the peace, among others. Notably, the Nuremberg Trials were among the first substantive international legal actions that were taken against individuals who engaged in what was recognized as international crimes. The trials took place between 1945, when the 1945 IMT was established, and 1949. Therefore, the 1945 IMT Charter is considered the root of the international criminal jurisprudence.¹³⁶

The International Law Commission of the United Nations established the Nuremberg Principles, which were seven in number.¹³⁷ The Principles are as follows: Principle I provided for individual responsibility for international crimes; Principle II stipulates that a person who commits international crimes is still liable under international law, even national law may not impose any penalty; Principle III strips those who commit international crimes of all immunities that are available to him or her; Principle IV does not relieve anyone committing international crimes on the order of a superior; Principle V provides that a person who has been charged under international law has the right to a fair trial; Principle VI sets out what constitute international crimes, which are similar to the ones set out in the Rome Statute; finally, Principle VII clarifies that complicity in the commission of international crimes is a crime under international law. Some of these principles have been adopted in the Rome Statute, as will be seen later.

The counterpart to the Nuremberg Tribunal was the International Military Tribunal for the Far East (IMTFE), which was alternatively referred to as the Tokyo War Crime Tribunal. The tribunal was set up to try Japanese war crime perpetrators.¹³⁸

The other *ad hoc* international criminal tribunal that have existed since then included the 1993 International Criminal Tribunal for the former Yugoslavia (ICTY), which was a creation of

¹³⁵ Cherif Bassiouni, *International Criminal Law: International Enforcement, Volume 3* (Boston, MA: BRILL, 2008), 32.

¹³⁶ Ibid.

¹³⁷ See Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, with commentaries, 1950.

¹³⁸ Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial: A Sociopolitical Analysis* (Japan: University of Ottawa Press, 2010).

the UN Security Council (UNSC) under the Security Council Resolution 827 to deal with international crimes that had been committed in the region.¹³⁹ Importantly, the next major international tribunal that was formed to deal with international crimes was the International Criminal Tribunal for Rwanda, 1994.¹⁴⁰ The tribunal was formed under the UNSC Resolution 955 to try those who had participated in the Rwandan Genocide that took place in 1994.¹⁴¹

During the period before the 1990s, there was an increased impetus to codify and develop international criminal law and to establish international courts increased, but the efforts remained largely unsuccessful. However, some important achievements were made. First, some international criminal law provisions were codified, with the Genocide Convention of 9 December 1948 being one of the important initiatives.¹⁴² Besides, the Geneva Conventions of 12 August 1949 were concluded. Finally, in 1977, the Additional Protocols to the Geneva Conventions were also completed.¹⁴³

Second, on 11 December 1946, the United Nations General Assembly (UNGA), through its Resolution 95, confirmed the Nuremburg Principles that were established during the Nuremburg Trials.¹⁴⁴ Subsequently, by 1996, the International Law Commission (ILC) adopted the Draft Code of Crimes against the Peace and Security of Mankind during its forty-eighth session in 1996.¹⁴⁵ In the Draft Code, the ILC made a number of recommendations, one of which was that the Draft Code could take various forms: an international convention; incorporation of its provisions in the statute of an international criminal court; or it could be adopted as a code of the declaration by the UNGA.¹⁴⁶

All the tribunals that have been mentioned above were *ad hoc* in nature; they were only formed after facts with which they dealt. However, with the continuous development of the international criminal justice system, the Rome Statute of the International Criminal Court (the Rome Statute) was concluded and adopted on 17 July 1998 and it came into force on 1 July

¹³⁹ Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (New York, NY: OUP Oxford, 2012), 90.

¹⁴⁰ André Klip and Göran Sluiter, *The International Criminal Tribunal for Rwanda 2000-2001, Volume 6* (Oxford, NY: Intersentia nv, 2003), 11.

¹⁴¹ Nicolas A. J. Croquet, *The Role and Extent of a Proportionality Analysis in the Judicial Assessment of Human Rights Limitations within International Criminal Proceedings* (Danvers, MA: Martinus Nijhoff Publishers, 2015), 10.

¹⁴² Adopted by the General Assembly of the United Nations on 9 December 1948.

¹⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁴⁴ Jon Yorke, *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (New York, NY: Routledge, 2016), 199.

¹⁴⁵ Bassiouni, *supra* note 135.

¹⁴⁶ Recommendations of the Commission, 17.

2002. By 2016, the Rome Statute had 124 state parties.¹⁴⁷ Significantly, the Rome Statute created the first permanent international court, referred to as the International Criminal Court (the ICC), based in The Hague, Netherlands. The ICC has a jurisdiction only with respect to international crimes. Notably, different international criminal instruments, including the Rome Statute, have established different types of international crimes. For instance, the Rome Statute of the International Criminal Court has stipulated four key types of international crimes. Article 5 enumerates the crimes as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Article describes these crimes as the “most serious crimes of concern to the international community as a whole.”¹⁴⁸ Importantly, Article I of the *Institut de Droit International’s* Resolution on the Immunity from Jurisdiction of the States and of Person Who Act on Behalf of the State in case of International Crimes defines “international crimes” as serious crimes under international law, which include the crimes against humanity, genocide, torture and war crimes. The foregoing crimes are analysed in the subsequent subsections.¹⁴⁹

The Crime of Genocide

The crime of genocide is discernible from all other crimes based on the motivation underlying it. It is important to note that, toward the end World War II, Winston Churchill claimed that the world was being faced with a serious crime, the name of which was not yet known.¹⁵⁰ Based on history at the time, there was no term that could be used to refer to a wave of crimes that the German’s Nazi perpetrated against the Jewish population.¹⁵¹ Essentially, no precedent had existed to provide a reference for the crimes. Concerned with the same problem facing the world at the time, Raphael Lemkin, who was an adviser to the War Ministry of the United States, came up with the term “genocide” in his book, the Axis Rule in occupied Europe, to describe the crimes that Nazi Germany committed against Jews.¹⁵² In his book, Lemkin described genocide as the annihilation of a nation or of an ethnic community, an act that is underlined by a coordinated plan that is aimed at the total annihilation of an ethnic group or a nation.¹⁵³ He further explains

¹⁴⁷ United Nations, *Treaty Series*, vol. 2187, No. 38544.

¹⁴⁸ Article 5 of the Rome Statute of ICC.

¹⁴⁹ Justitia Et Pace Institut De Droit International, NAPOLI SESSION – 2009.

¹⁵⁰ Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in ...* (New York, NY: ABC-CLIO, 2008), 108.

¹⁵¹ Ibid.

¹⁵² Larry May, *Genocide: A Normative Account* (Cambridge, UK: Cambridge University Press, 2010), 4.

¹⁵³ Samuel Totten and Paul Robert Bartrop, *Dictionary of Genocide, Volume 1* (London, UK: ABC-CLIO, 2008), 31.

that such an act is perpetrated against specific individuals who have been carefully chosen as victims, purely on the basis that they belong to an unwanted ethnic community or group.¹⁵⁴

Article 6 of the Rome Statute has defined the term “genocide” as any of the acts it has defined, the commission of which is intentionally meant to destroy, either in whole or in part, “a national, ethnical, racial or religious group.”¹⁵⁵ Such acts include: the killing of the members of a group; instigating serious physical or mental harm to the members of the group; deliberately inflicting on the members of the group such conditions that are intended to cause a physical destruction, either in whole or in part; imposing measures with the intention of preventing births within a targeted group; and enforcing a forcible transfer of children of the group to another group. This provision expounds on the assertions that were made by Lemkin.¹⁵⁶

Evidently, for an act to be considered as a crime of genocide, four essential elements must be satisfied: the act must be criminal in nature; there must be an intention to destroy; the intention to destroy must be directed at a race, ethnic or religious groups; and such groups must be targeted on their basis.

It is important to note that Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (the 1948 Genocide Convention), adopted by the UNGA on 9 December 1948 and entered into force on 12 January 1951, captures the confirmation by the Contracting Parties that genocide is a crime under international law, regardless of whether such an act is perpetrated during times of peace or of civil conflicts. Under Article III of the 1948 Convention,¹⁵⁷ a person can be held criminally liable for the following acts: the commission of genocide; conspiracy to oblige genocide; direct and public provocation to commit genocide; an endeavour to commit genocide; and complicity in genocide.

Crimes against Humanity

Crimes against humanity constitute certain acts that are deliberately perpetrated as part of a systematic attack that is targeted at any civilian population or an identifiable part of a specific population.¹⁵⁸ Crimes against humanity include acts such as murder, enslavement, annihilation, expulsion and other brutal acts that are committed against a civilian population.¹⁵⁹ In addition to the foregoing acts, Article 7 of the Rome Statute defines “crimes against humanity” to include enslavement, forcible transfer of population, severe deprivation of physical liberties in violation

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ The UN Genocide Convention.

¹⁵⁸ Damgaard, *supra* note 85,387.

¹⁵⁹ Ibid.

of fundamental rules of international law, acts of torture, rape, sexual slavery and political, religious, ethnic, enforcement of apartheid, and the enforcement of disappearance of persons, among others.¹⁶⁰ It is evident that the body constituting crimes against humanity is broader than genocide, even though both remain crimes under international criminal law.

One of the most important things to note about crimes against humanity is that they can be committed both during war and in times of peace; this is what distinguishes it from war crimes. International law on crimes against humanity has not yet been codified. Instead, they have existed based on customary international law. Given this fact, it means that the laws against crimes against humanity cannot be derogated and must be upheld by all states; they are part of the *jus cogens*, from which no state can derogate.¹⁶¹

The absence of a comprehensive international convention on crimes against humanity has been a concern to the international legal community. Consequently, there have been efforts to define it. One of the initiatives has been by the Crime against Humanity Initiative, which is a project that is run by the Whitney R. Harris World Law Institute. The objective of the institute has been to achieve an international legal instrument that comprehensively addresses the issue of crimes against humanity. Through its initiative, the institute has published the Proposed Convention on the Prevention and Punishment of Crimes against Humanity.¹⁶² A subsequent document to the proposal was published as Forging a Convention for Crimes against Humanity.¹⁶³ In this regard, the institute has finalized a draft treaty regarding the crime. The United Nations International Law Commission and states around the world are currently seized of the draft treaty for debating purposes. In this respect, the UN International Law Commission voted on 30 July 2013 to include the subject of crimes against humanity as a part of its long-term scheme of work.¹⁶⁴

Despite the absence of a comprehensive international legal instrument to deal with this kind of crimes, individuals can still be charged for the crimes under the Rome Statutes or before any other international tribunal that is meant to deal with international crimes, the way it happened with regard to the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Notably, crimes qualify as crimes against humanity if they are part of a wider system of practice. For instance, torture, rape, political persecution, mur-

¹⁶⁰ Article 7 of Rome Statute of the ICC.

¹⁶¹ Damgaard, *supra* note 85.

¹⁶² The Proposed International Convention on the Prevention and Punishment of Crimes against Humanity, August 2010.

¹⁶³ Hilmi M. Zawati, 'Review Essay of Forging a Convention for Crimes Against Humanity' (2013) 11(4) Journal of International Criminal Justice 937-943.

¹⁶⁴ Washington University Law, 'Crimes Against Humanity Initiative Objectives Gain Support from UN International Law Commission' (n.d) <<http://law.wustl.edu/news/pages.aspx?id=9778>> accessed 15 June 2016.

der and extermination can be crimes against humanity if they are evidently a part of a systematic policy.

War Crimes

War crimes are also international crimes. The history of war crimes as a concept can be traced to the period when the body of customary international law relating to war between sovereign states was first codified; this was during the nineteenth and twentieth century.¹⁶⁵ Of great importance to the subject of war crimes is the infamous Nuremburg Trial, which were trials of individuals who had been accused of perpetrating serious crimes against civilian populations during World War II.¹⁶⁶ The trials resulted in the establishment of the Nuremburg Principles, which stipulate the acts that constitute war crimes. Under Principle VI(b), war crimes have been defined to include the violations of the laws of rules of war, which include such acts as murder, slave labour, deportation, maltreatment, murder, and mistreatment of prisoners of war, among others.

The violations of the 1949 Geneva Conventions are also considered as war crimes. The Geneva Conventions are a series of four treaties and additional three protocols, which provides for specific, clear standards relating to humanitarian treatment of different classes of individuals during times of war.¹⁶⁷ The purpose of the first Geneva Convention is to protect both wounded and sick soldiers on land during warfare.¹⁶⁸ The second Geneva Convention is meant to protect wounded, ill and shipwrecked soldiers who are at sea during the warfare.¹⁶⁹ The provisions of the third Geneva Convention are used only with respect to prisoners of war. Finally, the fourth Geneva Convention protects civilians; these include civilians who are in occupied territories. Concerning the protocols, the first one deals with issues of international conflicts, the second protocol deals with non-international conflicts, while the last one is meant for the recognitions of additional distinctive emblems. All these treaties and additional protocols provide for how various classes of people should be treated during warfare. If these provisions are violated, then a war crime is committed. Article 8 of the Rome Statute emphasizes that war crimes are committed when the aforementioned 1949 Geneva Conventions are violated.¹⁷⁰

¹⁶⁵ Nigel D. White and Christian Henderson, *Research Handbook on International Conflict and Security Law* (London, UK: Edward Elgar Publishing, 2013), 467.

¹⁶⁶ Susan Tiefenbrun, *Decoding International Law: Semiotics and the Humanities* (New York, NY: OUP USA, 2010), 158.

¹⁶⁷ Andrew Clapham, Paola Gaeta, Marco Sassoli, *The 1949 Geneva Conventions: A Commentary* (New York, NY: Oxford University Press, 2015), 329.

¹⁶⁸ Common Articles 2 and 3 Relating to International Armed Conflicts.

¹⁶⁹ Ibid.

¹⁷⁰ United Nations, Treaty Series, vol. 2187, No. 38544.

Crime of Aggression

The crime of aggression is one of the unique international crimes under Article 5 of the Rome Statute, primarily because, even though it has been listed as one of the international crimes and unlike the first three crimes above, the International Criminal Court is not able to exercise jurisdiction over it.¹⁷¹ Evidently, the Rome Statute as was originally adopted neither defined what the crime of aggression was nor set out its scope, because of the lack of consensus among stakeholders, especially the Assembly of State Parties, on the distinct definition of what should be considered crimes of aggression. Instead, Article 5(2) of the Rome Statute provided that the International Criminal Court (the ICC) can only exercise jurisdiction over the crime of aggression only after a provision would have been adopted pursuant to Articles 121 and 123 of the Statute, the provision of which should define what the crime of aggression was and set out the conditions under which the Court was to exercise jurisdiction over the crime.¹⁷² Article 5(2) further stated that such a provision had to be adopted in conformity with the Charter of the United Nations.¹⁷³

In response to the provisions of Article 5(2) of the Rome Statute, as originally adopted, the Review Conference of the Rome Statute adopted the amendments to the Rome Statute on 11 June 2010.¹⁷⁴ The amendments provided the definition of “crime of aggression” and stipulated the manner in which the ICC shall exercise jurisdiction over the crime.¹⁷⁵ Notably, the amendments, through resolution RC/Res. 6 of 11 June 2010, introduced into the Rome Statute Article 8 *bis*, effectively deleting Paragraph 2 of Article 5. Therefore, under Article 8 *bis* of the Rome Statute define “crime of aggression” based on the provisions of the Charter of the United Nations.¹⁷⁶ In this case, the crime of aggression is constituted by certain conditions. First, it is the “planning, preparation, initiation or execution” of an act of aggression that amounts to a manifest violation of the Charter of the United Nations. Second, a person who is in a position to exert or to direct a political or military action of a state must have committed the act that is considered that of aggression.¹⁷⁷

Paragraph 2 of Article 8 *bis*, further defines “act of aggression” to mean the use of “armed forces by a state against the sovereignty, territorial integrity or political independence of

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Duncan B. Hollis, *The Oxford Guide to Treaties* (New York, NNY: OUP Oxford, 2012), 355.

¹⁷⁵ Ibid.

¹⁷⁶ See Rome Statute of ICC.

¹⁷⁷ Ibid.

another state,” or in any manner that is in violation of the Charter of the UN. Paragraph 2 Sub-paragraphs (a) to (d) further sets out the acts that amount to the crime of aggression.¹⁷⁸

However, it is important to note that Article 8 *bis* of the Rome Statute will not in force until 1 January 2017 as stipulated in Article 15 *bis*, Paragraph 3 of the Statute, when State Parties are expected to make a decision to activate the jurisdiction of the ICC.¹⁷⁹ In this case, the ICC can only take up jurisdiction one year after Article 8 *bis* comes into force. Additionally, Article 15 *ter*, Paragraph 2 of the Statute provides that thirty State Parties must accept the amendments in order for the Article to come into force on the said date. Based on the foregoing facts, it is apparent that, even though the crime of aggression is recognized and has finally been defined under the international criminal law, no prosecutions will take place until certain conditions are met: it must wait until 1 January 2017; thirty State Parties must accept the amendments for it to enter into force on the appointed date; and one year has passed after coming into force on the appointed date.¹⁸⁰

Crime of Torture

Even though torture has been considered one of the elements of crimes against humanity, it has been considered as a crime on its own. Torture as a crime is the infliction of severe discomforts and sufferings on persons finding themselves in the hands of their offenders.¹⁸¹ Torture has been used for a long time as a strategy to extract information from people. Those who prefer torture as a strategy use it as a form of bullying or intimidating targeted individuals to obtain specific information of interest. Under Article 7(f) of the Rome Statute,¹⁸² torture is considered as a crime against humanity, if it is committed as a part of “a widespread or systematic attack”¹⁸³ that is targeted at any civilian population. However, it is considered as a distinct international crime under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Convention against Torture). It was adopted by the UNGA on 10 December 1984 through Resolution 39/46 and it entered into force on 26 June 1987 after 20 states deposited their instruments of ratification.¹⁸⁴

Article 1 of the UN Convention against Torture defines torture as any act through which severe pain or suffering is deliberately inflicted on a person with a view to extracting information

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge, UK: Cambridge University Press, 2005) 183.

¹⁸² See Rome Statute of ICC.

¹⁸³ Ibid.

¹⁸⁴ UN Convention against Torture.

him or her. According to the Article,¹⁸⁵ torture also entails certain elements: obtaining information for confession from a third person for purposes of punishing the person or a third person for crimes committed or suspected to have been committed; and intimidating or forcing a person for any reason on the basis of any kind of discrimination.¹⁸⁶ For the foregoing acts to constitute the crime of torture, they must instigated, consented to or based on the acquiescence of a public official or other person who acts in an official capacity.¹⁸⁷ As a caveat, Article 1 states that pain or suffering arising out of inherent or incidental lawful sanction does not constitute the crime of torture.

V) Immunity in Criminal Proceedings

Introduction

This chapter analyses and discusses the subject of immunity with respect to criminal proceedings. In this respect, functional and absolute immunities are discussed with respect to prosecution of international crimes within foreign domestic jurisdictions. The previous chapter has dealt with immunities that are available to foreign state officials with respect to the criminal jurisdictions of the receiving state. Accordingly, the previous chapter has established that diplomats and heads of states enjoy functional and absolute immunities from the criminal jurisdictions of the receiving state. They enjoy such immunities due to state immunity; this means that as foreign state officials, they cannot be subjected to the criminal law of the receiving countries, unless such immunities are waived by the sending state. Moreover, the previous chapter has also established that foreign state officials or representatives do not enjoy such immunities in their sending states, meaning that such immunities are only with respect to the receiving state. Nonetheless, this chapter analyses whether foreign state officials or diplomats enjoy the same immunities when it comes to committing international crimes under international laws.

Here, the question is as to whether foreign state officials enjoy both functional and absolute immunities in foreign jurisdictions with regard to international crimes and, if so, the extent to which they enjoy such immunities. The answer to the foregoing question depends on the extent to which domestic courts exercise jurisdiction with regard to international crimes. Therefore, before analysing both functional and absolute immunities in international crimes, it is important to deal with the issue of the jurisdiction of domestic courts in relation to international crimes.

¹⁸⁵ Ibid, Article 1.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

Jurisdiction of Foreign Domestic Courts with Respect to International Crimes

The international tribunal that is vested with the jurisdiction to deal with international crimes is the ICC. However, the Court does not have an original jurisdiction with respect to such crimes.¹⁸⁸ While Article 1 of the Statute grants the Court, which is a permanent international institution, the jurisdiction over individual persons for the most serious crimes of international concern, it categorically states that the Court shall have a complementary jurisdiction to national criminal courts. The complementarity of the Court's jurisdiction to that of national courts is emphasized in Paragraph 10 of the Preamble to the Rome Statute, which stipulates that the ICC shall be complementary to the national criminal jurisdictions.

Further, according to Article 17 of the Statute,¹⁸⁹ the ICC shall determine that a case is admissible when certain conditions are satisfied. One of the conditions is that a case is inadmissible if it is being investigated or prosecuted by a State that has jurisdiction over the crime committed. However, if the state having jurisdiction is deliberately not interested in or lacks the genuine capacity to investigate and prosecute the culpable persons, the ICC may take up jurisdiction.¹⁹⁰ The other important condition that must be satisfied is that the state with jurisdiction must have already investigated the case, but decided not to prosecute the responsible person.¹⁹¹ Nonetheless, if the state's decision not to prosecute is underlined by the lack of genuineness or the capacity to do so, the Court may take up jurisdiction. Therefore, the jurisdiction of the ICC over international crimes is based on the principle of complementarity, which means that national courts have the original jurisdiction and the right to prosecute international crimes and the ICC can only come in where such national courts fail or display the lack of capacity to proceed with the prosecution of such crimes.

Before the establishment of the Rome Statute of the ICC, there had been a challenge with regard to the issue of jurisdiction of both national and international criminal tribunals to deal with the crimes of the international nature, particularly when the ICTY and the International Criminal Tribunal for Rwanda (ICTR) were formed. In order to deal with the challenge, the United Nations Security Council (UNSC) vested the national courts and the two international tribunals with what it referred to as the concurrent jurisdiction,¹⁹² whereby two or more courts of different jurisdictions or legal systems are vested with simultaneous jurisdiction over a particular

¹⁸⁸ See Paragraph 6 of the Rome Statute.

¹⁸⁹ See Rome Statute of ICC

¹⁹⁰ Article 17(1) (a).

¹⁹¹ Article 17(1) (b).

¹⁹² Oscar Solera, 'Complementary jurisdiction and international criminal justice' (2002) 84(845) <<https://www.icrc.org/eng/assets/files/other/145-172-solera.pdf>> accessed 19 June 2016.

legal issue.¹⁹³ However, the supremacy that was granted to the two foregoing international criminal tribunals resulted in a further challenge as to jurisdiction, because different states had the feeling that their sovereignty were at the risk of erosion.¹⁹⁴ Consequently, there was a need for a jurisdictional arrangement that would ensure that international crimes were dealt with effectively and at the same time guarantee the preservation of state sovereignty.¹⁹⁵ The international community agreed that there should be complementary jurisdiction, whereby international criminal tribunals should only exercise jurisdictions over cases with which national jurisdictions have no capacity to deal or where the national courts have not shown the willingness to exercise their jurisdictions.¹⁹⁶ This means that the state plays a crucial role in the prosecution of international crimes.

It is important to note that the idea of complementary jurisdiction of the ICC was proposed and advanced by the International Law Commission (ILC), before it was ultimately incorporated into the Rome Statute.¹⁹⁷ In this respect, evidence shows that the ILC, while proposing the principle of complementary of jurisdiction, was cognizant of certain important facts: the need for an international criminal tribunal that would not emasculate the sovereignty of states; and the mechanism that was to be adopted to deal with international crimes did not undermine the efforts that were already in place within national systems to enact enough and appropriate laws to deal with international crimes.¹⁹⁸ In its Yearbook of the International Law Commission of 1994 (the 1994 Yearbook), the ILC proposed as part of the Draft Statute for an International Criminal Court¹⁹⁹ and that the international court to be established should have a complementary jurisdiction to that of national courts.²⁰⁰ In its commentary, which is expressed in the 1996 Yearbook, the ILC has noted that the purpose for which the international criminal court has been established is to provide a mechanism through which persons who have been accused of crimes of an international nature can be tried fairly in circumstances where alternative trial procedures may not be available or are ineffective.²⁰¹ The alternative procedures here are supposed to be in the context of national criminal justice systems.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Boston, MA: BRILL, 2008) 134.

¹⁹⁸ Solera *Supra* note 192.

¹⁹⁹ Adopted at the Forty-sixth Session, in 1994.

²⁰⁰ Ibid.

²⁰¹ Ibid.

In addition to the complementarity principle, national courts also derive jurisdiction to prosecute certain international crimes from the principle of universal jurisdiction.²⁰² Such crimes are referred to as the most serious crimes of a great concern to the international community as a whole. Even though it is not expressly mentioned or provided for, the principle of universal jurisdiction can be derived from the Paragraph 4 of the Preamble of the Rome Statute; the Paragraph states that the most serious crimes that are a concern to the international community in entirety must not be unpunished and that measures must be taken at the national level and that international cooperation must be enhanced to ensure effective prosecution of such crimes.²⁰³ Importantly, Paragraph 6 specifically recognizes that every state has a duty to exercise its criminal jurisdiction over persons who are responsible for international crimes. Given these provisions in the Rome Statute, national courts have the power to exercise their jurisdictions over international crimes. However, it is important to note that the Rome Statute of the ICC does not obligate states to establish universal jurisdiction.

It is important to note, further, the fact that the practice of universal jurisdiction is not uniform among states; there are states that have claimed a universal jurisdiction with respect to certain international crimes, while some have not.²⁰⁴ Accordingly, countries typically claim universal jurisdiction over specific international crimes, such as crime against humanity, war crimes, torture and extrajudicial execution, through national legislations.²⁰⁵ The scope and the extent to which this kind of a jurisdiction is applied vary from individual state to state. A number of states have come up with legislations and case laws claiming universal jurisdiction: In 1993, Belgium enacted the Belgium's Genocide law to exercise jurisdiction over war crimes, crimes against humanity or crimes of genocide;²⁰⁶ Germany came up with *Völkerstrafgesetzbuch*, alternatively known as the "international criminal code," or Codes of Crimes against Public International Law,²⁰⁷ through which it exercises universal jurisdiction over genocide, war crimes and crimes against humanity, among others; and Article 23.4 of Spain's 1985 Judicial Power Organization Act²⁰⁸ recognizes that Spanish courts can exercise jurisdiction over crimes such as genocide and terrorism that have been committed by its citizens or foreigners outside its territory. The

²⁰² Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Oxford: Intersentia nv, 2005), 115.

²⁰³ See Rome Statute of ICC.

²⁰⁴ Robert H. Bork, *A Country I Do Not Recognize: The Legal Assault on American Values* (Stanford, CA: Hoover Press, 2013), xxxv.

²⁰⁵ See *Pinochet Case*.

²⁰⁶ 16 June 1993.

²⁰⁷ 26 June 2002.

²⁰⁸ No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July).

scope of the Spanish law covers crimes that are recognized under international treaties or conventions; this means that Spain has taken up universal jurisdiction to deal with certain international crimes.²⁰⁹

However, it is important to note that the exercise and extent of the scope of universal jurisdiction with respect to international crimes are still controversial. Regardless of the debate about universal jurisdiction, the Rome Statute, which is the principal international treaty dealing with international crimes, recognizes that national courts have the right to primary jurisdiction over international crimes. Therefore, the question that arises in the context of this research is with respect to whether foreign state officials or representatives enjoy functional and absolute immunities before foreign national courts with respect to international crimes. The next section deals with this question.

Individual Criminal Liability under International Law

It was remarked earlier in this research that foreign state officials enjoy functional and absolute immunities from criminal jurisdictions of receiving states. The scope of these immunities is in relation to the subjection of the foreign officials to the domestic criminal jurisdiction of the receiving state. However, the question is as to whether the foreign courts can exercise their jurisdictions with regard to international crimes without regard to functional and absolute immunities that are granted to foreign state officials; this is the focus on this section. In the process, whether foreign state officials can invoke the two types of immunities before foreign national courts in defence where they have been accused of international crimes. In order to deal with this subject comprehensively, it is important to examine the concept of individual criminal responsibility under international criminal law.

Under international criminal law, an individual, not the state, has an individual criminal liability.²¹⁰ As a matter of significance, the collective nature of crimes as considered under international law does not give an excuse not to determine individual responsibility. More specifically, Article 25 of the Rome Statute deals with the issue of individual criminal liability. Article 25(1) grants jurisdiction over natural persons, while (2) stipulates that person who commits a crime over which the ICC has a jurisdiction shall be held individually responsible and shall be liable for punitive measures in accordance with the Statute.²¹¹

²⁰⁹ Ibid.

²¹⁰ See Rome Statute of ICC.

²¹¹ Ibid.

Article 25(3) of the Statute provides for modes of individual responsibility.²¹² First, the person is liable if he or she commits such a crime, whether in a capacity as an individual, jointly with another person or through another person, notwithstanding whether that other person is indeed criminally responsible.²¹³ Second, the person shall be individually responsible if he or she orders, solicits or induces another person or other people to commit such a crime, which in facts is committed or is attempted.²¹⁴ Third, if the person aids, abets or assists for purposes of facilitating the commission or an attempt of such a crime, he or she is individually liable for them crime; the individual liability remains even where such a person has provided the necessary means to for the commission of the crime.²¹⁵ Fourth, a person may also be held individually, criminally liable if he or she intentionally contributes in any other way to the commission or an attempted commission of the crime by a group of persons who act with a common purpose.²¹⁶ Such contributions can be made with the aim of furthering the commission of the criminal activity or criminal objective of the group, where such an activity or purpose entails the commission of a crime within the Jurisdiction of the ICC; or the contribution can be made with the knowledge of the intention to commit the crime in question. Fifth, with regard to the crime of genocide, a person becomes individually criminally liable if he or she directly and publicly incites other persons to commit genocide.²¹⁷

Article 25(3)(f) of the Statute explains the extent to which a person who engages in crimes over which the ICC may exercise jurisdiction is not considered criminally liable. According to the provision, an attempt to commit a crime under the jurisdiction of the ICC by taking an action that commences its execution through a considerable step, but the crime fails to happen due to circumstances that are beyond the control of the person makes the person involved who is involved individually criminally liable.²¹⁸ However, such a person shall not be held criminally liable if he or she stops committing a crime under the Rome Statute or prevents the completion of the commission of the criminal act voluntarily.²¹⁹ Under Article 25(3 *bis*) of the Statute, the provisions only applies, with respect to the crime of aggression, to persons who are in positions in which they can effectively exert control over or to direct the political or army of a state.

²¹² Ibid.

²¹³ Article 25(3)(a).

²¹⁴ Article 25(3)(b).

²¹⁵ Article 25(3)(c).

²¹⁶ Article 25(3)(d).

²¹⁷ Article 25(3)(e).

²¹⁸ Article 25(3)(f).

²¹⁹ Ibid.

The provisions of Article 25 of the Rome Statutes espouse the conditions under which a person can be held criminally liable under international criminal law.²²⁰ Impliedly, if the conditions are not satisfied, the person cannot be prosecuted under the said international law. However, it is important to note that these provisions only apply where the court has jurisdiction over an international criminal act. It appears that, where a case has been taken up by a national jurisdiction, the provisions do not apply, and a national court that has assumed jurisdiction may prosecute based on its national laws. A country may come up with statutes that implement international criminal law at the domestic level. In this case, the provisions can be interpreted to mean that, if the conditions that are set out in the Rome Statute are not satisfied, the ICC cannot admit a case, even if the crimes allegedly committed are serious and a national court has not commenced or concluded any legal proceedings to bring a perpetrator to justice.²²¹

It is important to note that state officers may be prosecuted for whatever crimes they commit in their home states. Any immunity that is granted to them as state officials in his home country is based on national legislations. In such a scenario, any immunity that such a person enjoys under international law does not prejudice any criminal or civil action that his/her state may decide to take against him/her before national courts. Notably, even though it is settled that the international criminal²²² and national laws of sending states can waive all immunities of the diplomatic, consular and other officials of a state, there have been debates on whether a foreign state can do the same in cases of international crimes.

Nonetheless, up to this point, it is clear that only individual persons can be held criminally responsible for international crimes and it is further clear that foreign national courts can exercise their jurisdiction over international crimes as spelt out in the international criminal law. After establishing the foregoing facts, it is important to deal with the question as to whether foreign state officials who have been accused of having committed an international crime can involve functional and absolute immunity as defence. Such officials include both incumbents and former state representatives.²²³

Functional Immunity in International Crime

Functional immunity is granted to certain persons who perform certain functions on behalf of a state, given that a state must rely on the natural person in order to accomplish its tasks.

²²⁰ United Nations, *Treaty Series*, vol. 2187, No. 38544.

²²¹ Ibid.

²²² Ibid.

²²³ See 1961 VCDR; 1963 VCCR

Some of the persons to whom such immunity is available include heads of states, diplomats, foreign ministers, consuls, officials of special missions, and some families of diplomatic officials. Thus, since consuls have less immunity as compared to other foreign state officials, it is important to dispense with the issue of functional and absolute immunity in their case. In this respect, regard is had to the provisions of Article 41(1) of the 1963 VCCR,²²⁴ which states that consular officers shall only be liable to arrest and detention pending trial only in cases of a grave crime and based on a decision by the competent judicial authority. Manifestly, the 1963 VCCR does not define the meaning of “a grave crime,”²²⁵ though the meaning can be derived from the Rome Statute.²²⁶ The Rome Statute deals with international crimes, which includes the crime of genocide,²²⁷ the crimes against humanity,²²⁸ war crimes,²²⁹ and the crime of aggression.²³⁰ In Paragraph 3 of the Preamble, the Statute mentions “... that such grave crimes threaten the peace, security and well-being of the world,”²³¹ which can be interpreted to mean a reference to the foregoing crimes. Accordingly, the foregoing international crimes can be considered grave crimes, within the meaning Article 41(1) of the 1963 VCCR. Therefore, it can be concluded that consular officials do not enjoy functional and absolute immunities with respect to grave crimes, namely international crimes. It is important to remark that a competent foreign domestic court may advise the arrest, detention and trial of foreign consuls, if it considers that they have committed grave crimes. In this regard, it may not be necessary that such grave crimes must be crimes under international criminal law. Hence, the consuls are denied both functional and absolute immunities in cases where they have been accused of grave crimes, which may include international crimes, and where a competent judicial authority has advised their arrest, detention and trial.

The concern now shifts to heads of states and other diplomatic officials. In this case, many different instances exist in which foreign national courts have attempted to exercise jurisdiction over incumbent and former foreign diplomatic officials who have been accused of committing international crimes. However, many of such attempts have often failed, mainly because of the claim of functional immunity that is enjoyed by the diplomatic officials and heads of states and heads of governments.

²²⁴ United Nations, *Treaty Series*, vol. 596, p. 261.

²²⁵ *Ibid.*

²²⁶ See Rome Statute of ICC.

²²⁷ *Ibid.*, Article 6.

²²⁸ *Ibid.*, Article 7.

²²⁹ *Ibid.*, Article 8.

²³⁰ *Ibid.*, Article 8 bis

²³¹ See Preamble of Rome Statute of ICC

State officials who usually enjoy automatic functional immunity include heads of governments, heads of states, diplomatic officials, officials of special missions, and defence and foreign ministers. The common international practice is that seating heads of states and serving diplomatic representatives enjoy functional immunity by virtue of their incumbency. With respect to diplomatic officials, Article 31(1) of the 1961 VCDR is very clear as to the immunity of diplomatic agents to the criminal jurisdiction of a receiving state. The Article states precisely that “[a] *diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.*”²³² This provision does not give any exception to any form of immunity, much less functional immunity. Besides, Article 39 of the Convention further espouses that immunity subsists even after a diplomatic leaves office, so long as he or she performed acts a member of the diplomatic mission.²³³ Therefore, these provisions can be interpreted to mean that, while a diplomatic agent is still occupying office and after the expiry of tenure, he or she cannot be subjected to any criminal prosecution, including being held liable under international criminal law in a foreign domestic court. Importantly, the provision does not make any distinction as to jurisdictions under international and national laws. Thus, diplomatic agents and special mission officials can plead the defence of functional immunity under Articles 31(1) and 39 of the 1961 VCDR.

Many cases that have been decided at both the international and national levels have confirmed the provision of Articles 31(1) and 39 above. An example is the ICJ’s *Arrest Warrant Case* of 11 April 2000 (*Democratic Republic of Congo v Belgium*), which was decided in 2002. The facts of the case have already been presented under Chapter 1.²³⁴ The ICJ came up with a number of findings in favour of functional immunity for an incumbent diplomatic agent. First, it found that it is an established principle of international law that heads of states, diplomatic officials, consuls, foreign ministers, heads of governments and heads of states enjoy immunities from both criminal and civil jurisdictions of other states.²³⁵ Second, the court found that an incumbent minister, by the very nature of his or her functions and the fact that he or she represents the interest of a sovereign state, is entitled to functional immunity. In making such a finding, the court noted that such a minister, in performing state functions, might need to travel to different foreign states and because of that, he or she is entitled to immunity from the criminal jurisdictions of other states. In this finding, the court further noted that such immunity is determined and granted by the customary international law in the absence of a treaty law. This finding implies

²³² Article 31(1) of Vienna Convention on Diplomatic Relations 1961.

²³³ Ibid, Article 39.

²³⁴ *Arrest Warrant Case*, *supra* note 8.

²³⁵ Ibid.

that only a treaty can limit functional immunity as it applies to an incumbent foreign minister.²³⁶ Third, the ICJ found that an incumbent minister is entitled to immunity for any act he or she performs in both official and private capacity and that functional immunity applies irrespective of whether he or she is within a foreign territory for an official duty or a private visit.²³⁷ Fourth, and most importantly, the ICJ refused to admit the claim by Belgium that the minister did not enjoy any immunity by virtue of the fact that he was accused of having committed international crimes. Instead, the court held that the customary international law on immunity of an incumbent state minister before a foreign national court did not have an exception.²³⁸ The court specifically stated that it could not deduce from the relevant international criminal laws any exception to the rules regarding the immunity with respect to criminal proceedings of persons rightfully exercising official state functions. Finally, the ICJ argued that even though various international conventions grant jurisdiction to national courts over various crimes and, in some cases, require the states to exercise such a jurisdiction, the requirement does not vitiate or diminish the immunities that are provided to foreign ministers under international law when it comes to criminal prosecutions before foreign national courts.²³⁹

In essence, by ruling that the granting of jurisdictions to national courts does not affect the immunities that foreign ministers have under international law, the ICJ held the common state practice that does not tolerate the prosecution of incumbent foreign state officials for any form of crimes. It also underlines the fact that several attempts by different countries to prosecute incumbent foreign state officials have largely failed. The common denominator in all the foregoing arguments is that such foreign ministers and diplomatic officials' actions are attributed to the state, meaning that, instead of holding them responsible, the states of which they are representatives should be held to account for any actions, including criminal actions.

Another important case in which functional immunity was upheld in the case of officials acting on behalf of a state is that of the *Prosecutor v Blaskic*, before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.²⁴⁰ The Tribunal empathized that state officials are simply tools of a state and their official actions are attributable only to the state for which they are representatives; because of this, they enjoy functional immunity.²⁴¹ Just like the

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ *Prosecutor v. Tihomir Blaskic*, Case No: IT-95-14-A, United Nations, International Criminal Tribunal for the Former Yugoslavia, 2004.

²⁴¹ Ibid.

ICJ in the Arrest Warrant Case, the Tribunal reiterated that functional immunity is an established rule of customary international rule, of which the roots can be traced back to the period between the eighteenth and the nineteenth centuries.²⁴² The Ruling in English Supreme Court case of *Zoernsch v Waldock*²⁴³ affirms the fact that a foreign state official performs the official acts of his or her sending state and, as such, his or her actions should only be attributable to the state. The contentious question here is what constitutes an official act of state or function. In this respect, a number of scholars have argued that acts amounting to international crimes might still be in furtherance of a state policy, meaning that it can still be attributed to the state and at the same time spare the individual person acting on its behalf from the criminal jurisdiction of a foreign criminal court.

Important to note is the fact that even incumbent heads of states and heads of governments enjoy functional immunities before foreign national courts with respect to international crimes. The findings in the ICJ's *Arrest Warrant*²⁴⁴ Case apply to current heads of states and governments by extension. Several other attempts to arrest and prosecute incumbent heads of states and governments before foreign national courts have tended to follow the rulings of the ICJ in the above case. For instance, in the *Robert Mugabe case*²⁴⁵, a Senior District Judge declined to issue an arrest warrant against the President of Zimbabwe, Robert Mugabe, reasoning that he enjoyed immunity from criminal prosecution before the UK courts due to his status as a president still in office.

The immunity from criminal jurisdiction in foreign courts has further been upheld in a number of countries: France's Court of Cassation²⁴⁶ held that Libyan leader Gaddafi could not be prosecuted in France because he was an incumbent head of government, though his status as a either a head of government of state remained controversial until his death; similarly in the case of the president of Rwanda, President Paul Kagame could not be tried for international crimes because of his capacity as a head of state²⁴⁷; and the UK's Attorney-General had stated that Saddam Hussein, being a head of state, as he then was, enjoyed immunity with respect to the UK's

²⁴² Ibid.

²⁴³ *Zoernsch v Waldock* [1964] 1 Weekly Law Reports 675.

²⁴⁴ *Arrest Warrant Case*, *supra* note 8.

²⁴⁵ Colin Warbrick (2004), Public International Law: I. Immunity and International Crimes in English Law, International and Comparative Law Quarterly, 53, pp 769-774.

²⁴⁶ Arret of the Cour de Cassation, 13 March 2001. No. 1414, at1, (as cited *Do Head of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, Salvatore Zappala 2001).

²⁴⁷ Gerald Gahima , *Transitional Justice in Rwanda: Accountability for Atrocity* (New York: Routledge, 2013), 206.

criminal jurisdiction, among others.²⁴⁸ Given all the above cases, it is clear that functional immunity is available to all heads of states and governments, foreign ministers and diplomatic officials still in offices; this means that they can invoke functional immunity when faced with criminal charges before foreign national criminal courts or jurisdictions.

Evidence showing that former heads of state and all former officials who acted on behalf their states in official capacities are entitled to functional immunity before foreign national courts. As has been noted by the ICJ in the *Warrant of Arrest Case*²⁴⁹, there is no exception to functional immunity. Remarkably, since the immunity exists under both customary international law and treaty law, exceptions can only exist by the consent of and a binding agreement among UNGA member states. However, it is highly unlikely that the member states will have the required political will to accept, either expressly or progressively, any arrangement that might introduce international crime exception to functional immunity that exempt foreign heads of states or governments and foreign ministers and diplomatic officials from criminal jurisdictions of foreign national courts. However, one might pose a contrary argument that some states have managed to prosecute former heads of other states or former diplomatic officials. In this case, the *Pinochet Case*²⁵⁰ often comes into focus.

Senator Augusto Jose Ramon Pinochet was a former head of state of Chile who served from 1973 to 1990. A Spanish magistrate accused him for crimes against humanity, which he was alleged to have committed, while still the head of Chile. The British authorities arrested him in 1998 when he sought a medical treatment there. He was to be extradited back to Spain to face charges, which included 94 counts of torture against Spanish citizens, among other offenses that amounted to international crimes.²⁵¹ During the proceedings that went up to the House of Lords, it became clear that the position of the UK and Spanish courts was that Pinochet did not enjoy functional immunity as a former head of state, based on the crimes with which he was charged. Based on this, they two countries claimed that Pinochet could be prosecuted before their national courts, pursuant to universal jurisdiction.²⁵²

The Divisional Court of the Queen's Bench Division ruled that Pinochet enjoyed immunity from UK's criminal jurisdiction because of he was a former head of state, Chile. The court

²⁴⁸ *The Law of State Immunity*, *Supra* note 13, 550.

²⁴⁹ *Arrest Warrant Case*, *supra* note 8.

²⁵⁰ *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, Ex parte Pinochet Ugarte, House of Lords, 1999.

²⁵¹ *Ibid*

²⁵² *Ibid*

reasoned that he undertook his actions while in the cause of performing state functions. The prosecutor representing Spain argued that the crimes that Pinochet committed, which included the crime of torture and crimes against humanity, did not form part of the state functions that were performed by Pinochet. Therefore, he was not entitled to immunity against criminal jurisdiction of both Spain and the UK. When the matter went to the House of Lords (also known as *Pinochet No. III*), it was ruled that state immunity is only available with respect to acts that the international law recognizes as the official functions of a head of state or government. In the circumstances, the House of Lords explained such functions included neither hostage taking nor torture. Finally, it ruled that Pinochet could not get away with international crimes and that he could face extradition proceedings.²⁵³

From the various cases that have been presented above, there is no doubt that heads of states and governments, diplomatic officials and foreign ministers enjoy functional immunity from prosecution in foreign criminal jurisdictions. However, a trend in which former foreign state officials have been arrested and tried before foreign courts is emerging; this has been exemplified in the *Pinochet case*²⁵⁴, which was handled in the UK courts. Such a trend seems to contradict the long held belief that functional immunity is not time-bound; that it continues even after a person stops being a state officer. The question here is in relation to what might have actually changed. In this respect, the emerging contemporary debate concerns two specific issues: what characterizes functional immunity or *immunity ratione materiae* and what constitute actions that are performed in an official capacity so that they are considered “acts of state.” In this regard, it is important to consider the work of the International Law Commission, a specialized organization of the United Nations that is charged with the development of international law.

International Law Commission and Functional Immunity

In its Second report on immunity of State officials from foreign criminal jurisdiction²⁵⁵, the International Law Commission has stated that, if it is assumed that state officials should enjoy functional immunity (*immunity ratione materiae*) from foreign criminal jurisdiction, it is important to address some questions regarding the scope of this kind of immunity. Further, the ILC has noted that it is important to distinguish between acts that are performed in an official capacity and acts that are private in character.²⁵⁶ In addition, the ILC contends that it should be clarified whether *ultra vires* and illegal acts fall within the framework official functions; the con-

²⁵³ Ibid.

²⁵⁴ *Pinochet Case*, *supra* note 250.

²⁵⁵ 66th Session of the International Law Commission (2014).

²⁵⁶ Ibid.

cern that ILC has raised is as to whether state officials enjoy functional immunity with respect to acts that done before coming into office and acts that are done after leaving office.²⁵⁷

The ILC attempted to analyse the above issues in its Fourth report on immunity of State officials from foreign criminal jurisdiction.²⁵⁸ In the report, ILC has explained that the fundamental characteristics of functional immunity are as follows: it is granted to all state officials; it is granted only in relation to acts that can be described as “acts that are performed in an official capacity”;²⁵⁹ and it is not time-bound, because it continues to protect a state official long after he or she vacates the office.²⁶⁰

Notably, in the Third report on immunity of State officials from foreign criminal jurisdiction, ILC has noted that an individual enjoying functional immunity from the criminal jurisdiction of foreign courts must meet three conditions.²⁶¹ First, the individual should be a position in which he or she may be considered a state official. Second, the individual so considered a state official must perform his or her functions in an official capacity. Finally, the act must be carried out during the individual’s terms in office;²⁶² it appears that all these conditions must be fulfilled. From the foregoing, it can be deduced that, without satisfying the three conditions, an individual cannot enjoy functional immunity. The first and third conditions are not contentious. However, if they were to be, they would not be as contentious as the second one. With regard to the first condition, a person acting in an official capacity is appointed by a state. The fact that an act is performed while such a person is still in office is a question of fact that is not difficult to determine through analysis. However, the second condition, which deals with what should be regarded as an act that is performed in an official capacity, is the most contentious. It is apparent that the determination of whether a state official enjoys functional immunity is based on whether the actions he or she undertakes while still in office are official acts and whether such acts are conducted in an official capacity. When attempting to describe what “act performed in an official capacity” is, the ILC’s Fourth report relies on the judgments that have been made by the ICJ and other international tribunals, the existing international treaties and conventions and state practices.²⁶³

²⁵⁷ Ibid.

²⁵⁸ 67th Session of the International Law Commission (2015).

²⁵⁹ Ibid.

²⁶⁰ Ibid, Paragraph 17.

²⁶¹ 66th Session of the International Law Commission (2014).

²⁶² Ibid.

²⁶³ *Supra* note 258.

One of the ICJ cases to which the report of the ILC has referred is the *Arrest Warrant*²⁶⁴ case, which has been examined in earlier in this research paper. The report recognizes the reasoning of the court that the act of a foreign minister may bind the state that he or he represents. Based on this information, the report concludes that the activities that are exercised by a foreign minister and other diplomatic officials derive from some elements of governmental authority. In this case, the report concludes that such activities must be taken into account when determining what constitutes acts that are performed in an official capacity.²⁶⁵

With respect to *Jurisdictional Immunities of the States (Germany v Italy)*,²⁶⁶ some German military and other state officials had been accused of having committed certain crimes of an international nature in both Italy and Greece. Even though the actions amounted to international crimes, the ICJ, in its judgment, stated that the acts that were committed were *acta jure imperii*,²⁶⁷ meaning that they were public acts that were attributable to Germany as a state. As such, the accused German state officials were protected under functional immunity, even though the court does not mention this particular immunity expressly. The ILC concluded in its report that the ICJ considered the acts of the German officials as acts of state, meaning that they can be considered acts that were performed in an official capacity, thereby affording the officials functional immunity.²⁶⁸

Even though the ILC report relies on the above ICJ judgments to allude to what may be considered acts that are performed in an official capacity, the judgments do not provide a precise definition of what may constitute “acts performed in an official capacity.” However, all the cases, by both ICJ and some national courts presented above, point to a common practice in which incumbent and former heads of states or governments, foreign ministers and diplomatic officials enjoy functional immunity, with an exception of the *Pinochet case*, which is further analysed in the subsequent paragraphs. This paper takes the position that Pinochet’s prosecution was based on national laws of both the UK and Spain.

The facts of *Pinochet case*²⁶⁹ have already been presented herein. Notably, the UK’s House of Lords ruled that Pinochet did not enjoy immunity due to the nature of the international crimes of which he was accused.²⁷⁰ The UK authorities allowed Pinochet to return to Chile on an

²⁶⁴ *Arrest Warrant Case*, *supra* note 8.

²⁶⁵ 67th Session of the International Law Commission (2015).

²⁶⁶ *Jurisdictional Immunities of the States (Germany v Italy)*, ICJ Reports 2012, Paras. 60 and 61.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Pinochet Case*, *Supra* note 250.

²⁷⁰ *Ibid*

account of ill health. Of significance to this research is the House of Lords' ruling that, based on the nature of the crimes of which was accused, Pinochet did not enjoy any immunity that was available for a head of state with respect to a foreign criminal jurisdiction.²⁷¹ It is important to remember that functional immunity that is available to heads of states or governments and diplomatic officials are based on customary international law and international treaty laws. It is also an accepted fact that heads of states or governments and high profile diplomatic officials continue to enjoy functional immunity even after leaving office. Therefore, under international law, the emphasis that there is no exception to this immunity is resounding; this is even supported by the ICJ's judgment in the *Arrest Warrant case*, in which the court stated that it could not find from customary international law or treaty law any exception to functional immunity with regard to criminal prosecutions of state officers in foreign jurisdictions.²⁷² In such a circumstance, the ICJ judgment in the *Jurisdictional Immunities of the States (Germany v Italy)*, which argued that the acts that were performed in violation of human rights were *acta jure imperii*,²⁷³ can be applied in the *Pinochet case*. Whatever crimes Pinochet committed, they can be regarded as part of the state policy, meaning that they can be regarded as acts performed in an official position. Consequently, such acts were attributable to the state of Chile, not Pinochet.²⁷⁴

Another important thing to note is that functional immunity only ends if a state itself ceases to exist. In this case, Chile had not stopped existing; therefore, Pinochet still enjoyed functional immunity. In addition, the rules of customary international law only change when similar new rules emerge; for there to be a customary international law, two elements must be fulfilled: state practice and *opinion juris sive necessitatis*,²⁷⁵ elements of which cannot be satisfied by just one instance of practice as in *Pinochet case*.²⁷⁶ Importantly, treaties and not national laws can be used to change customary international laws. In this respect, Spanish and British authorities did not have competence to derogate from a customary state practice among the international community with regard to the immunities of heads and former heads of states or governments. Most importantly, while arguing that Pinochet did not enjoy immunity, Spain and Britain used their respective domestic legislations, meaning that the two jurisdictions did not have regard to the rules of international law. Therefore, the UK's House of Lords, by applying

²⁷¹ Ibid.

²⁷² *Arrest Warrant Case*, *supra* note 8.

²⁷³ *Jurisdictional Immunities of the States (Germany v Italy)*, *supra* note 266.

²⁷⁴ Ibid.

²⁷⁵ Article 38(1)(b) Statute of International Court of Justice. See *North Sea Continental Shelf cases of 1969* for the opinion of ICJ regarding to 'juris sive necessitatis'.

²⁷⁶ *Pinochet Case*, *supra* note 250,

the existing international law, should have arrived at the conclusion that Pinochet enjoyed functional immunity, based on customary international law.²⁷⁷

With respect to acts becoming a state official, the Second Report of the ILC Committee clarifies that functional immunity does not protect a foreign state official with respect to crimes committed in a private capacity before coming into office.²⁷⁸ Similarly, this kind of immunity is available to former state officials who commit international crimes out of office. The implication is that such a person can only claim immunity for actions he or she committed while still working as a state officials.

Evidently, the international law provides heads of states or governments and diplomatic officials with functional immunity against prosecutions before foreign national courts for crimes they commit while still in office. Even though the Rome Statute of the ICC expressly states that criminal liability applies to individuals without regard to their official capacity,²⁷⁹ functional immunity makes it difficult for foreign criminal jurisdictions to hold high ranking state officers criminally liable for international criminal laws. Given this difficulty, the Fourth Report of the ILC has taken the position that any criminal act that is covered under functional immunity is not, in its strictest sense, an act that is attributable to a state, but a responsibility that should be shouldered by the person who has committed it.²⁸⁰ Consequently, the report adopts the model of “single act, dual responsibility,” the basis on which the Drafting Committee of the ILC adopted two definitions.²⁸¹ The first one deals with what constitute “an act performed in an official capacity” and the second one defines the scope of functional immunity. Draft Article 2(f) provides that, for its own purpose, an “act performed in an official capacity” has the meaning of any act that is undertaken by a state official in the execution of state authority.²⁸² In adopting this definition, the Draft Committee has advanced the belief that international crimes should be considered acts that are performed in an official capacity.

However, the definition that has been offered in Draft Article 2(f) still leaves a lot of points to debate, because it does not define the scope of “state authority.” It should be acknowledged that state authority might involve the commission of a crime, an act that must be exercised by an individual who the state allows to act on its behalf since the state cannot act on its own

²⁷⁷ Ibid.

²⁷⁸ 60th session of the International Law Commission (2008).

²⁷⁹ Article 27 of Rome Statute of International Criminal Court.

²⁸⁰ 67th Session of the International Law Commission (2015).

²⁸¹ Ibid, (Advance Unedited Version 24 August 2015), Para 182.

²⁸² 67th Session of the International Law Commission (2015), A/CN.4/L.865.

without agents. For instance, where it becomes a state policy to torture a certain group of people or, alternatively, where it is a state policy to perpetrate crimes against humanity against the population of another state. Therefore, the use of “authority” in the definition of “an act performed in an official capacity” is still not precise enough. Therefore, a further debate on what can be precisely regarded as a state authority of acts that are performed in an official capacity is still necessary.

Draft Article 6(1) has provided the scope of functional immunity.²⁸³ In this regard, it states that state officials enjoy functional immunity only in relations to acts that performed in an official capacity. The definition simply codifies the ICJ’s judgment in the Arrest Warrant²⁸⁴ case and the House of Lords’ ruling in the *Pinochet case*,²⁸⁵ both of which stated that the foreign state officials enjoyed immunities in respect of official acts. The new definition by the Draft Article 6(1) as to who enjoys functional immunity is still not enough clear to provide a precise meaning of “acts performed in an official capacity.”²⁸⁶ If the ILC decides to predicate the issue of who enjoys this kind of immunity on the definition of what entails “acts performed in an official capacity,” then Draft Article 2(f)²⁸⁷ still stands in the way of providing the scope of who should enjoy such immunity. Meanwhile, in the absence of alternative definitions, the current functional immunity as it exists under customary international law prevails; this means that no exception exists with regard to functional immunity in relation to prosecution of foreign state officials before the courts of foreign jurisdiction. Therefore, the ILC still has a lot to do to help the international community have an exception to functional immunity, so that former foreign state officials can be held criminally liable before foreign national courts for the international crimes, especially crimes against human rights. It is important to examine and analyse the position of the *Institut de Droit International* on this subject.

***Institut de Droit International* and Functional Immunity**

The *Institut de Droit International* (hereafter IDI), translated as the Institute of International Law, was established on 8 September 1873 in Belgium.²⁸⁸ It is a non-governmental organization with the aim of contributing to the development of international laws and making

²⁸³ Ibid.

²⁸⁴ *Arrest Warrant Case*, *supra* note 8.

²⁸⁵ *Pinochet Case*, *supra* note 250.

²⁸⁶ 67th Session, *supra* note 282.

²⁸⁷ Ibid.

²⁸⁸ The *Institut de Droit International*, < <http://justitiaetpace.org/> > (accessed 1 July 2016).

efforts to have them implemented as international laws. The members of the IDI study various aspects of law and adopt resolutions that should persuade the international community to change international laws for the better. Once they adopt resolutions, they bring them to the attention of state authorities, international organizations and all other relevant members of the international scientific community. Since its inception, IDI has come up with numerous different resolutions touching on various issues of interest to the international legal order. One of the issues with which it has been concerned is the trial of incumbent and former state officers who have been accused of international crimes of which they might be accused.²⁸⁹

With respect to immunity of state officials against criminal jurisdictions of foreign national courts, the IDI adopted the 2009 Resolution on the Immunity from Jurisdiction of the State and Persons Who Act on Behalf of the State in case of International Crimes in Naples.²⁹⁰ Article II of the 2009 Naples Resolution espouses the principles that the IDI would like to be adopted as part of the international legal system pertaining to immunities. Article II(1) acknowledges that immunities are granted to ensure that there is an orderly allocation and exercise of jurisdictions by foreign states in line with international law, especially in proceedings pertaining to international crimes. It further notes that such immunity is conferred with a view to respecting the sovereign equality between and among states and to enabling the effective performance of the functions of representatives who act on behalf of sending states.²⁹¹

Article II(2) of the Resolution states that treaties and customary international law mandate every individual state to prevent and subdue international crimes.²⁹² Consequently, IDI, through this Article, takes the position that immunities should not be a hindrance to the reparations to which victims of international crimes are entitled. Hence, in Article III(3), it is of the opinion that it should be necessary for states to waive immunity of its officials where they have allegedly committed international crimes. It is important to acknowledge only the sending state can waive the immunities enjoyed by its officials or representatives.²⁹³ In most cases, states are resultant to waive the immunities, making it difficult to hold state and former state officers enjoying functional immunity responsible in foreign criminal courts for international crimes. The fact that immunities of state officials have been an obstacle to the provision of justice to victims

²⁸⁹ Ibid.

²⁹⁰ *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Third Commission, Justitia Et Pace Institut De Droit International, Napoli Session-2009.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

of international crimes makes the IDI to adopt a resolution urging that mechanism should be in place to remove the obstacle. Consequently, IDI suggests that states should waive such immunities so that officials who commit international crimes can face justice in foreign jurisdictions.²⁹⁴ States have always had the ability and prerogative to waive immunities of both serving and former state officials who commit international crimes so that foreign courts can exercise their criminal jurisdiction over them. For instance, pursuant to Article 32 of the 1961 VCDR, a sending state can waive the immunity of a diplomatic agent.²⁹⁵

Based on the above argument, it is evident that the problem is not the immunities, but the states of which they are representatives. If a state has a sense of duty to prevent and suppress the violation of international criminal laws, it should consider waiving such immunities where one or some of its officials engage in acts that amount to international crimes. Article 32 of the 1961 VCDR evidently supports this waiver. If the sending state waives the immunity, its officials might fear the consequences of engaging in criminal acts while undertaking their official functions. Knowing about consequences has the possibility of motivating the officers to perform their functions in line with relevant national and international laws.

Article IIII of Naples Resolution²⁹⁶ deals with the immunity of persons acting on behalf of a state. In this respect, Article III(1) of the Resolution provides that no immunity from jurisdiction, except personal immunity, should attach as to international crimes.²⁹⁷ The provision means that functional immunity and other forms of immunities should be provided to a state official who engages in international crimes. Second paragraph²⁹⁸ states that personal immunity, which is *immunity ratione personae*, ends immediately the mission or position of a state official expires. When it ends, the officials are required to leave the receiving state within a certain period.

It is worth pointing out that not all foreign state officials enjoy functional immunity. For instance, it has been discussed earlier in this paper that the consuls can be subjected to a foreign criminal jurisdiction in cases of grave international crimes. In relation to this, when advising that functional immunity should be available to a foreign state officer who has allegedly committed an international crime, IDI fails to specific rank of foreign officials who can be prosecuted for

²⁹⁴ Ibid.

²⁹⁵ Article 32 of 1961 VCDR states; ‘*the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State*’.

²⁹⁶ Napoli Session-2009, *supra* note 290.

²⁹⁷ Ibid.

²⁹⁸ Ibid, Article III(2) of the Resolution.

international crimes before foreign jurisdictions. In this regard, it is not clear how it handles the cases of consular officials, who tend not to be covered under functional immunity in cases of international crimes. Nonetheless, it can be interpreted with the general view that IDI advocates for the limitation of functional immunity where a state official acting on behalf of a state can be held personally responsible for crimes of international nature.

Absolute Immunity in International Crimes

Under customary international law, heads of states or governments and, based on the ICJ judgment in the *Arrest Warrant Case*²⁹⁹, foreign ministers and high ranking diplomatic officials enjoy absolute immunity before national courts of foreign jurisdictions. Just as it is with respect to functional immunity, there has been a debate about whether the foregoing state officials enjoy absolute immunity in relation to international crimes. In this section, the focus is on the interaction between absolute immunity and prosecution for international crimes before foreign criminal courts. Pertaining to diplomatic officials, Article 31 of the 1969 Convention on Special Missions (the 1969 CSM) stipulates that diplomatic officials and special mission representatives enjoy immunity from the criminal jurisdiction of the receiving state.³⁰⁰ Importantly, just like the 1961 VCDR, the 1969 CSM does not give any exception to the immunity for such officials in office, which means that the officials enjoy absolute immunity while still in office. However, under Article 32 of the 1961 VCDR, sending states may decide to suspend such an immunity to enable its officials face justice in foreign courts.³⁰¹ A similar provision exists in Article 41 of the 1969 CSM. The conclusion that can be made from the above provisions is that diplomatic and special mission officials enjoy absolute immunity from the criminal jurisdiction of foreign states, but the sending states may decide to waive them. If a sending state does waive such immunity, the officials are protected for as long as they are still in the office.

Nonetheless, looking at the provisions of Article 39(2) of the 1961 VCDR, immunity that is enjoyed during tenure in office should normally cease the moment the official leaves the territory of a foreign country to which he or she was credited, or on the expiry of a reasonable period within which he or she may be required to do so.³⁰² Even though this provision does not speak of absolute immunity, the way it reflects that also refers to absolute immunity. There is an important thing to note about the construction of Article 39(2)³⁰³; it has two limbs. The first limb refers

²⁹⁹ *Arrest Warrant Case*, *supra* note 8.

³⁰⁰ United Nations, *Treaty Series*, vol.1400, p.231.

³⁰¹ United Nations, *Treaty Series*, vol. 500, p. 95.

³⁰² *Ibid.*

³⁰³ *Ibid.*

to absolute immunity and it is the part stating that, when the functions of a person enjoying immunity comes to an end, his or her immunity should come to an end when leaving the country or as may be required. It is the first limb that is of relevance to absolute immunity. Therefore, it can be concluded that the absolute immunity of a diplomatic official ceases at the end of his or her tenure in office. The second limb refers to functional immunity, which has been dealt in the previous section. This second limb provides that the immunity shall continue to subsist even if the functions of the person have ended.³⁰⁴

From the outset, it is important to note that there is no doubt, incumbent heads of states or governments, together with high ranking state officials, enjoy absolute immunity before criminal courts of foreign jurisdictions, even when they are abroad on a private capacity. This position follows from the ICJ's ruling in the *Arrest Warrant case*³⁰⁵, in which it stated that certain high-ranking officials enjoy immunity in foreign jurisdictions. State practices also show that the personhood of a head of state is inviolable.

State practices further confirm the fact that a head of state enjoys absolute immunity even in cases of international crimes. For instance, in the French *Cour de Cassation*³⁰⁶ ruled that the head of state of Libya, as he then was, could not face any criminal prosecution in France because of his status. The case of Mugabe,³⁰⁷ as was decided in an English court, together with the calls and attempts to prosecute Fidel Castro in Spain, an attempt that was rejected in Order of 4 March 1999³⁰⁸, add to the evidence showing the trends of state practices when it comes to criminal responsibilities of heads of states.

In furtherance of the above argument, scholars have contended that serving heads of states are entitled to absolute immunity from criminal jurisdiction of foreign courts,³⁰⁹ confirming the ICJ's position that such immunity applies in both official and private capacities. In the case of *Marcos v Federal Department of*³¹⁰, the Swiss Supreme Court took a similar position by stating that heads of states are granted absolute immunity and that they are exempt *ratione personae* from "all measures of constraint and exercise of jurisdiction" of foreign courts. The court further held that the heads of states enjoy such an immunity with respect to any act they have

³⁰⁴ Ibid.

³⁰⁵ *Arrest Warrant Case*, *supra* note 8.

³⁰⁶ *Arret of the Cour de Cassation*, *supra* note 246.

³⁰⁷ *Robert Mugabe Case*, *supra* note 245.

³⁰⁸ High Court (Audiencia Nacional), Order (auto) of 4 March 1999 (no 1999/2723).

³⁰⁹ Joanne Foakes, *the Position of Heads of State and Senior Officials in International Law* (OUP Oxford, 2014) 81.

³¹⁰ *Marcos v. Federal Department of Police*, Swiss Federal Tribunal, (1989), 102 ILR 53 at 57.

committed anywhere around the world.³¹¹ Therefore, the conclusion that can be made is that absolute immunity covers a head of state in terms of all actions they commit both in official and private capacities; these include civil acts.

The above facts relating to heads of states is supported by the *Institut de Droit International* (hereafter IDI) in its 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (hereafter the 2001 Resolution).³¹² Under this Resolution, IDI takes the position that heads of states that are still in office are entitled to absolute immunity. Resolution states that a head of state is inviolable while in the territory of a foreign state.³¹³ IDI advises that such a person may not be subjected to any form of arrest or detention. This provision confirms the position of the customary international law relating to absolute immunity of a head of state or of government. Importantly, Article 2 of the Resolution, which is of great importance to this research, states that the head of a state enjoys immunity from the criminal jurisdiction of the courts of a foreign state.³¹⁴ Such immunity is available to the head of state, even in cases where he or she is accused of having committed grave crimes, which include crimes of an international nature; this provision emphasizes the general position of an international law as it currently prevails, especially with regard to the international customary law.³¹⁵

However, the resolution states that a head of state may lose absolute immunity if his or her state decides to waive it, having regard to the national legal framework of the state.³¹⁶ IDI advises that such immunity should be waived when the head of state is suspected to have committed serious or grave crimes. Article 8 of the Resolution allows states to establish by agreements the extent to which they may derogate from absolute immunity that is provided to their respective heads of states. What IDI is stating is that serving heads of states or of governments enjoy absolute immunity from foreign courts in relations to international crimes, with some exceptions: where a decides to waive the immunity with certainty and where two or more states limit the extent of such an immunity through agreements.³¹⁷

³¹¹ Ibid.

³¹² Session of Vancouver-2001, Immunities From Jurisdiction and Execution of Heads of State and of Government in International Law, Justitia Et Pace Institut De Droit International.

³¹³ See Article 1 of the 2001 Resolution.

³¹⁴ See Article 2 of the 2001 Resolution.

³¹⁵ Ibid.

³¹⁶ See Article 7 of the 2001 Resolution.

³¹⁷ Articles 7 and 8 of the 2001 Resolution.

The same arguments are supported under Draft Article 3 of the ILC's Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction of states, which states explicitly that heads of states, heads of government and ministers for foreign affairs are entitled to *immunity ratione personae*, which translate to absolute immunity from the jurisdiction of foreign courts.³¹⁸ Draft Article 4 sets the scope of this kind of immunity. Accordingly, the ILC is of the opinion that such immunity is only for the duration of the head of state's term in office.³¹⁹ Besides, during the subsistence of that immunity, all acts that are performed, whether in private or official capacity, by a head of state, a head of government and ministers for foreign affairs before or during term in office are covered and these persons cannot be subjected to foreign jurisdictions. Notably, all these provisions and expositions are in line with customary international law, which is one of the earliest sources of law on immunities; most statutes dealing with immunities have codified such laws.

Based on the foregoing arguments, it is a settled matter that incumbent heads of states enjoy absolute immunity with regard to international crimes; this means that they cannot be prosecuted for international crimes before foreign criminal courts. However, the question that needs to be answered is pertains to whether they enjoy absolute immunity after leaving office, the way they do as to functional immunity. In this case, a former head of state only continues to enjoy functional immunity, but not absolute immunity. This notion is supported by ILC's Draft Article 4(3),³²⁰ which stipulates that the cessation of absolute immunity does not affect the application of functional immunity. In advancing the argument that such a person only maintains immunity with regard to acts that are performed as official state functions and holding him or her for acts that were committed at a personal level, the problem regarding "acts performed as official functions" still resurfaces. Evidently, both immunities run at the same time, with the only difference being that functional immunity continues beyond the office. This scenario is what causes the difficulties as to what can be regarded as acts of states performed in an official capacity so that it the practical scope these immunities can be distinguished.

The IDI has also dealt with the issue of former heads of states and their individual criminal liability under international law. In Article 13(1) of its 2001 Resolution,³²¹ IDI takes the position that a former head of state does not enjoy inviolability in the territory of a foreign state. Paragraph 2 of the Article means that a former head of state loses the absolute immunity he or

³¹⁸ A/62/10, 2007, Yearbook of the International Law Commission.

³¹⁹ Ibid, Draft Article 4(1).

³²⁰ Ibid, Draft Article 4(3).

³²¹ Session of Vancouver-2001, *supra* note 312.

she enjoyed while still serving in office, but still maintain immunity with regards to acts that he or she performed in an official capacity and relate to the functions of the position of a head of state.³²² However, Paragraph 2 provides that, notwithstanding the foregoing, the head of state can still be prosecuted for crimes of international nature.³²³ Pursuant to Article 16 of the Resolution, Article 13 and 14 applying to a head of state is also applicable to a head of government.³²⁴

A number of conclusions can be made after the foregoing arguments. First, heads of states, heads of governments, diplomatic officials, officials of special missions and ministers for foreign affairs enjoy absolute immunity while they are still in office. Second, such an immunity lapses at the expiry of their tenures in office. Third, and finally, such immunity is enjoyed with respect to acts that were performed before or during the period when such persons are in office.

VI) Conclusion and Recommendations

Conclusion

This thesis commenced from the premise that debates are still divided as to the relevance of both functional and absolute immunities for state officials before foreign criminal jurisdictions, specifically where international crimes are involved. In this regard, the state of the problem noted that the emergence of the concept of human rights at the international has necessitated the debate of whether state officials should continue to enjoy functional and absolute immunities with regard to proceedings relating to international crimes before national courts. In this regard, the research sought to achieve some objectives. First, it sought to discuss what international crimes are, based on the provisions of international conventions, especially the Rome Statute of the International Criminal Court. Second, it sought to provide better understanding to the nature of both functional and absolute immunity under international criminal law. Third, and finally, it sought to provide a critical analysis on the foreign state officials enjoying functional and absolute immunities. The questions that the thesis sought to answer were directly related to the objectives.

In achieving the above objectives, the study used a qualitative approach. In this respect, the doctrinal method of legal studies was preferred, because the process would require the analysis of various doctrinal materials, especially relevant international instruments, draft articles of

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid.

the ILC and Resolutions of the IDI. Additionally, decisions of the ICJ and various national courts have been utilized as part of the doctrinal methods.

International crimes are defined as encompassing crimes that affect the peace and safety more than one sovereign state. They are crimes that arise under international criminal law.³²⁵ They include crimes that are of the nature so reprehensible that the intervention of the international community is justified under relevant international laws. With the advent of international criminal law, the focus has drastically shifted away from the state as the subject of international law.³²⁶ An individual conduct of a person has now been placed under international law. In this respect, the international community has realized that certain crimes that effect the conscience of humanity can only be dealt with where responsible persons are held individually liable. Consequently, the emergence of international criminal laws, right from the time of the Nuremburg Trials to the establishment of the ICC, has witnessed individual persons held responsible for such crimes. For the avoidance of doubt, the international laws have spelt out what are considered international crimes; crimes of torture, crimes against humanity, crimes of genocide, war crimes and crimes of aggression.³²⁷ All these crimes are recognized under the Rome Statute of the ICC.³²⁸ According to various international treaties, no person enjoys any form of immunity before an international criminal tribunal, including the ICC, in relation to the commission of the foregoing international crimes. Such a waiver will enable international criminal tribunals to prosecute culprits, who might not be held to account for their criminal acts due to state reluctance.

Individual criminal liability is well espoused in Article 25 of the Rome Statute.³²⁹ Article 25(3)(f) of the Statute explains the extent to which a person who engages in crimes over which the ICC may exercise jurisdiction is not considered criminally liable.³³⁰ According to the provision, at attempt to commit a crime under the jurisdiction of the ICC by taking an action that commences its execution through a considerable step, but the crime fails to happen due to circumstances that are beyond the control of the person makes the person involved who is involved individually criminally liable. However, such a person shall not be held criminally liable if he or she stops committing a crime under the Rome Statute or prevents the completion of the commission of the criminal act voluntarily. Under Article 25(3 *bis*) of the Statute, the provisions only

³²⁵ Damgaard, *supra* note 130.

³²⁶ *Ibid.*

³²⁷ Article 5 of the Rome Statute of ICC.

³²⁸ *Ibid.*

³²⁹ *See* Rome Statute of ICC.

³³⁰ *Ibid.*

applies,³³¹ with respect to the crime of aggression, to persons who are in positions in which they can effectively exert control over or to direct the political or army of a state.

The need to deal with international crimes is attended by jurisdictional issues. In this regard, among the debate about immunities and international crimes, the issue of jurisdiction of the ICC and national courts has featured prominently. Remarkably, the Rome Statute of the ICC has established that the ICC only exercises complementary jurisdiction with regard to international crimes.³³² This means that national courts have the primary jurisdiction over international crimes. The ICC only comes in where national courts have failed to undertake the prosecutions either deliberately or due to lack of capacities to do so. However, the discourse about immunities is with respect to foreign national courts.

The discussions about functional and absolute immunity have been extensive. From the outset, it is important to point out that certain state officials enjoy functional and absolute immunity. The discussion commenced with functional immunity, which is otherwise referred to as *immunity ratione materiae*. This kind of immunity is in relation to acts performed in an official capacity on behalf of an appointing state. Consuls enjoy functional immunity only to the extent that they do not commit or engage in acts amounting to grave crimes, as stipulated in Article 41(1) of the 1963 VCCR.³³³ The said Article provides that consular officers shall only be liable to arrest and detention pending trial only in cases of a grave crime and based on a decision by the competent judicial authority. Apart from grave crimes, consuls are functionally immune to the criminal jurisdiction of receiving states. It means that they cannot enjoy absolute immunity in the context of international crime.

The common international practice is that seating heads of states and serving diplomatic representatives enjoy functional immunity by virtue of their incumbency. With respect to diplomatic officials, Article 31(1) of the 1961 VCDR is very clear as to the immunity of diplomatic agents to the criminal jurisdiction of a receiving state.³³⁴ The Article specifies diplomatic officials are entitled to immunity from criminal jurisdiction of foreign states, which is often the jurisdiction of a receiving state. The diplomats enjoy functional immunity even after they have left office, pursuant Article 39 of the Convention.³³⁵ A number of ICJ judgments and decisions of various national courts back the above provisions. An example of ICJ judgments is the *Arrest*

³³¹ Ibid.

³³² Rome Statute of ICC, Paragraph 10, Article 1.

³³³ *United Nations*, Treaty Series, vol. 596, p.261.

³³⁴ *United Nations*, Treaty Series, vol. 500, p.95.

³³⁵ Ibid.

Warrant case.³³⁶ National court decisions include *Zoernsch v Waldock*,³³⁷ *Robert Mugabe case*,³³⁸ and Spain's ruling in the Spain's *Audiencia Nacional*, through the Order (auto) of 4 March 1999.³³⁹

In debating about functional immunity, both the International Law Commission (ILC) and *Institut de Droit International* (IDI) have added their opinions through Draft Articles and Resolutions respectively. The ILC has adopted a number of draft articles in which it has expressed what functional immunity should cover. However, it still makes the conclusion that functional immunity for heads of states, diplomatic and other officials extends beyond terms of office. The ILC argues in its Second report³⁴⁰ that functional immunity only attaches to all state officials; it is granted only in relation to acts that can be described as “acts that are performed in an official capacity”; and it is not time-bound, because it continues to protect a state official long after he or she vacates the office.³⁴¹ This means that any action that cannot be categorized as an act “performed in an official capacity” is not covered under functional immunity. However, neither the international law, nor the ILC has succeeded in providing a precise definition of what should constitute “acts performed in an official capacity.” Nonetheless, the position of the ILC is that heads of states and other diplomatic officers who enjoy functional immunity are protected during their tenure and after vacating office. This conclusion recognizes the common practice that considers functional immunity to subsist as long as the state exists.

The *Institut de Droit International* has also given its input. While acknowledging that international treaties and customary international law mandates every state to protect foreign state officials from its criminal jurisdiction, it is of the opinion that sending states should waive the immunities of their agents who commit international crimes so that they can face justice in foreign courts that are willing to prosecute them. Waiving immunities of foreign officials by their sending states is grounded in law. However, doing so requires political will among states.

It is evident that the international practice under various treaties, customary international law and national court decisions favour the fact that heads of states, heads of governments, foreign ministers, diplomatic officials and officials of special missions enjoy functional immunity, both during and after their tenure in offices, unless such immunity is waived by their states under relevant national laws. Different states have their own legal ways of conferring and waiving im-

³³⁶ *Arrest Warrant*, *supra* note 8.

³³⁷ *Zoernsch v. Waldock Case*, *supra* note 97.

³³⁸ *Robert Mugabe Case*, *supra* note 245.

³³⁹ *Audiencia Nacional*, *supra* note 308.

³⁴⁰ 66th Session of the International Law Commission (2014).

³⁴¹ *Ibid*, Paragraph 17.

munities. In the case of foreign jurisdiction, customary international law position tends to impede the waiver of immunity in respect to international crimes.

However, from the discourse, it is clear that foreign states find it almost impossible to exercise their criminal jurisdictions over international crimes in relation to foreign officials because of the difficulty in determining what constitute “acts performed in an official capacity.” Many of those who acknowledge that functional immunity continues even after office have contended that such an immunity should extend to foreign officials in relation to acts that violate international human rights. In this respect, they hold the position that acts of international crimes such as torture, genocide and crimes against humanity should not be attributable to the state. Instead, individual state officials should be held responsible and should be able to stand trials before foreign courts. Standing trials before foreign courts are important, especially where sending states are reluctant to prosecute them. Holding such officials individually liable before foreign courts for international crimes that they commit while still in office will remain challenging based on two things: the concept of “acts performed in an official capacity” has not been defined precisely and such immunity has not been waived by sending states.

A number of conclusions with regard to absolute immunities can also be made. One of the conclusions is that, unlike functional immunity that excludes acts performed in private capacities, absolute immunity covers both official acts and acts performed in private capacities. Another conclusion is that, unlike in functional immunity, which continues after office, absolute immunity terminates at the expiry of the tenure of a foreign state official. It means that a person enjoying absolute immunity during his or her tenure as a foreign state official can be prosecuted for international crimes he or she commits once the tenure expires. Finally, it is important to emphasize that absolute immunity covers both acts that are committed both in official and private capacities. However, some acts that are committed in a private capacity may amount to acts that are attributable to the state. In this respect, the challenge is with regard to how private acts and acts that are done in a private capacity can be distinguished, so that a former state official is not prosecuted in foreign courts for actions that fit within functions that are performed on behalf of the state. This challenge, as has been noted earlier, makes it difficult to provide a practical distinction between functional and absolute immunities, especially given the fact that they are not enjoyed separately during tenure in office.

With respect to the final object, officials who enjoy functional and absolute immunities before foreign courts with in relation to international crimes include heads of states, head of governments, ministers for foreign affairs, diplomatic officials and officials of special missions.

Based on the discussions in this research, it is evident that functional and absolute immunities can be invoked by foreign state officials in criminal proceedings regarding international crimes before foreign courts. Attempts to strip such officers such immunities have failed due to a lack of a customary practice among the international communities and the absence of a multilateral treaty limiting the immunities. Notably, an exception to these immunities can possibly be found, but only after “acts performed in official capacity” are given a precise definition, so that it becomes easy to distinguish actions that can be attributed to a state and the ones for which individual foreign state officers may be held responsible. Without such an exception, the foreign officials will always be able to invoke these immunities before foreign national courts in cases where they have been accused of international crimes.

Recommendations

The need to bring to justice high ranking state officials who commit or perpetrate international crimes has been hampered greatly by functional and absolute immunities. This research has affirmed that heads of states, heads of governments, ministers for foreign affairs, diplomatic officials and officials of special missions enjoy both immunities, making it difficult to bring the ones who engage in international crimes before foreign national courts to face justice. In this respect, a number of recommendations are appropriate to help in the development of exceptions to these immunities.

One of the recommendations is with regard to the scope of functional immunity. It is established that functional immunity continues even after a foreign state has left office. However, this immunity works only with respect to acts that are performed in an official capacity, meaning that such a person is not covered under functional immunity where acts of crimes that are committed do not fall within official functions. The problem is how to distinguish acts that are done in an official capacity from those that are done at a personal level. The current position in law is that all acts of an incumbent state official, with an exception in the case of consular officials, are attributed to the state, notwithstanding whether such acts are criminal in nature or not. Therefore, until a precise definition and scope of the concept of “acts performed in an official capacity” is provided, no exception to functional immunity will be achieved. In this respect, it is worth recommending that the international community should work towards finding a precise definition of the concept.

The International Law Commission has attempted to define the concept, but it has not yet achieved a useful definition. A grey area still exists with regard to what constitute acts attributable to a state and the ones for which an individual state officer may be held responsible. Such a

scenario makes it impossible to hold culpable state officers individually responsible for violations of international or fundamental human rights. In this case, the ILC, through cooperation with UNGA, should provide a practical definition of the concept in question.

In another related issue, the distinction between functional and absolute immunity is still not clear. Foreign state officers who enjoy one of the immunities also enjoy the other. Coupled with the problem of the definition of the foregoing concept, the lack of distinction between the two types of immunities makes it nearly impossible to hold individual foreign state officers responsible for international crimes before foreign jurisdiction. Therefore, it is recommended that the international community should work with the ILC to come up with distinct scopes of both immunities.

Without prejudice to the foregoing definitions, it is recommended that sending states should take approach to waive the immunities of its officers so that they face foreign criminal prosecution in cases where they are accused to have committed international crimes, especially when such crimes affect the receiving states. In doing so, it is further recommended that the UNGA should adopt Article III(3) of the IDI's 2009 Naples Resolution, which suggests that states should waive immunities of their culpable officials. It is important to note that the 1961 VCDR already allows states to do so. However, it is up to the states to invoke the provisions. Adopting IDI's resolution should be accompanied with a mandatory requirement that, where it has been established through a competent judicial authority an international crime has been committed, every state must waive the immunity of former heads of states and other high ranking officials so that they may face justice in a foreign court. Such a step, though drastic, will help in the establishment of relevant exceptions to the immunities.

Even though high ranking state officials enjoy functional and absolute immunities with respect to crimes and international crimes in foreign jurisdictions, such immunities do not apply in home states from where the officers are sent. A state decides how it deals with and grants immunities to its officers. In this regard, if states recognize their international obligations to deal with international crimes and to suppress and prevent violations of international human rights, they can prosecute its responsible officials without worrying about immunities. In most states, everyone is equal before the law, except for heads of states, who may be exempted from criminal and civil litigations when they are still in office. Thus, it is recommended that states should contribute towards eliminating international crimes by prosecuting its own officials who become culpable or waiving their immunities to allow willing foreign states to take up jurisdiction.

Additionally, it is recommended that international criminal tribunals, especially the ICC, should be given a primary jurisdiction over certain grave crimes, such as torture and all other international crimes that are listed in the Rome Statute and other international conventions. Even though such a measure is a radical move, it is one of the most appropriate approaches for dealing with individuals who are responsible for international crimes and holding them individually liable. The relevance of this recommendation is underlined by the fact that most states are reluctant to waive immunities of their officers to face justice in foreign courts and they are always reluctant to prosecute such officers whenever they are accused of committing international crimes. Giving a primary jurisdiction to the ICC will preserve the sanctity of state immunity and sovereignty. Such a move will also ensure that states do not begin proceedings against their officials merely to shield them from prosecution. However, while doing so, incumbent heads of state, heads of governments and other high ranking officials should enjoy the immunities while still in office. After the expiry of their terms in office, they should be held accountable for violations of fundamental human rights committed during their tenure. Removing the concept of complementarity will mean that the ICC and any other international criminal tribunal will be able to act promptly to bring the culprits to justice.

Finally, absolute immunity is not good in terms of enhancing business and development within an economy. In order to prevent foreign state officials unfairly taking advantage of their absolute immunity, restricted immunity should increasingly be adopted and practiced in order to hold officials who face civil suits in foreign national courts responsible, particularly with respect to commercial transactions. Commercial relations may sometimes be public in nature. Hence, this recommendation should be adopted in relation to commercial transactions into which foreign state officers enter at personal or private levels. Again, it is important to specify what kinds of commercial transactions are done on behalf of a state, and which ones are done at private level.

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Abstract

This thesis is an assessment of whether functional and absolute immunity can be invoked in criminal proceedings by foreign state officials in relation to international crimes. It sought to achieve three main objectives: to provide a legal discussion as what are international crimes; to provide better understanding to nature of both functional and absolute immunity under international law and; to provide a critical discussion on the foreign state officials who can enjoy functional and absolute immunities. Under international criminal law, no one has immunity before any international criminal tribunal court, such as the International Criminal Court, if accused of international crimes. This means that state officers may not plead any form of immunity as a defence to avoid criminal prosecution before international judicial institutions. However, heads of state and other high ranking officials are often accorded functional and absolute immunities in foreign states under customary international and treaty laws. Bearing this in mind, the Rome Statute of the International Criminal Court states unequivocally that no one enjoys immunity with regard to crimes over which the ICC has jurisdiction. However, given the fact that the ICC only has a complementary jurisdiction, national courts are viewed as having the primary jurisdiction to try those who have been accused of international crimes, while this scenario does not pose any challenge with civilians, a significant challenge arises where states officers have been accused of international crimes, because of equality between sovereign states and, most importantly, state immunity. Therefore, this thesis sought to assess whether state officers can invoke functional and absolute immunity before foreign national courts, if accused of international crimes. In achieving the objectives above, a doctrinal approach was used in the assessment. After the assessment, it has been concluded that, even though no one enjoys any immunity before international criminal tribunals including the ICC, based on customary international law, reasoning in the ICJ's decided case, national case laws and international conventions, heads and former heads of states, heads and former heads of governments and other incumbent and former high ranking state officials enjoy both functional and absolute immunities when accused of international crimes. However, consuls enjoy such immunities only to the extent that they have not engaged in grave crimes. With respect to functional immunities, the defence of immunity is only with regard acts performed in an official capacity. It is also concluded that functional immunities continues beyond the tenure of office, while absolute immunity ends after tenure in office.