

# AN ANALYSIS OF THE CONCEPT OF HEAD OF STATE IMMUNITY IN THE POST-WESTPHALIAN WORLD ORDER\*

*Vestefalya Sonrası Dünya Düzeninde Devlet Başkanlarının  
Yargı Bağımsızlığı Kavramı Üzerine Bir Analiz*

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## ABSTRACT

In the era of globalization, the Westphalian concept of state sovereignty is eroding. Although still the sole creator of international law, sovereign states are not the sole actors or subjects of international law anymore. The subjects now include individuals as well as non-state actors. As Westphalian sovereignty is considerably affected by the changes in the world order, inevitably, the privileges derived from it would also be affected. One focus point to observe such influence is the concept of ‘The Head of State Immunity’ which is derived from the immunity granted to states on the basis that equals do not have authority over one another. However, the new dynamics of the international order are more concerned with ending impunity rather than the preservation of jurisdictional immunity, particularly for international crimes. However, despite all the measures taken, it is still difficult to claim that the immunity of the head of state has been entirely abolished. This article analyzes the concept of immunity of the head of state in light of changes in the Post-Westphalian era.

**Key Words:** individual criminal responsibility, post-westphalia, international criminal court, human rights, head of state immunity

## ÖZET

Küreselleşme çağında, Vestfalyan devlet egemenliği kavramı aşınmaktadır. Egemen devletler, hâlâ uluslararası hukukun tek yaratıcısı olsa da, artık

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uluslararası hukukun tek aktörü veya öznesi değildir. Uluslararası hukukun sùjeleri artık bireyleri olduđu kadar devlet dıřı aktörleri de içermektedir. Vestfalya egemenliđi, dünya düzenindeki deđişimlerden önemli ölçüde etkilendiđinden, egemenlikten kaynaklanan ayrıcalıklar da kaçınılmaz olarak etkilenmiş durumdadır. Bu tür bir etkiyi gözlemlemek için odak noktalarından biri, eşitlerin birbirleri üzerinde yetki sahibi olmadığı temelinde devletlere tanınan dokunulmazlıktan türetilen ‘Devlet Başkanlarının Yargı Bağışıklığı’ kavramıdır. Bununla birlikte, uluslararası düzenin yeni dinamikleri, özellikle uluslararası suçlar bakımından, yargı bağışıklığının korunmasından çok cezasızlığın sona erdirilmesine odaklanmaktadır. Ancak alınan tüm tedbirlere rağmen, devlet başkanının dokunulmazlığının tamamen kaldırıldığını iddia etmek hâlâ güçtür. Bu makale, devlet başkanlarının yargı bağışıklığı kavramını Vestfalya sonrası dönemdeki deđişimler ışığında incelemektedir.

**Anahtar kelimeler:** bireysel cezai sorumluluk, post-vestfalya, uluslararası ceza mahkemesi, insan hakları, devlet başkanı bağışıklığı

## INTRODUCTION

The Treaty of Westphalia created and spread sovereign state-oriented world order. Sovereign equality was empowered by the principles of non-intervention and national self-determination. In this context, states were benefitting from absolute immunity from the jurisdiction of foreign states. As the heads of state are the main representatives of the states in the international order, they started to benefit from the jurisdictional immunity derivatively. The ongoing process of globalization has become the key factor in understanding the current world order. The globalization process is also called as the end of sovereign states in literature, which symbolizes that the states lost significant power in their institutional autonomy. While states were engaging in trading activities, their absolute immunity from the jurisdiction has been changed into a restrictive immunity form. The changes regarding the sovereign privileges were not limited to this. In this era, human rights and the idea of international justice stand out as universal values, causing the emergence of concepts that can be considered more sacred than sovereignty has been, so the acts concerning human rights abuses which have reached the peremptory norm status resulted in committing the international crimes.

As the traditional international law approach was not even recognizing the individuals as actors, the international crimes committed by the heads of state were being categorized as the acts of the sovereign state. However, as a result of the terrific events that took place during the world wars, the international legal order started to adopt a more humanitarian ideology. Consequently, the traditional international law approach started to deteriorate with the establishment of new substantive laws and involvement of non-state actors.

After the formation of individual criminal responsibility, a major contradiction arisen between the idea of ending impunity and the protective shield of state officials granted by the traditional international law. This research aims to find out the answer to the question of “To what extent the international justice succeeded in removing the immunity of the head of state regarding the international crimes?”

## I. THE LEGAL FOUNDATION OF HEAD OF STATE IMMUNITY IN INTERNATIONAL LAW

The idea of sovereign and equal states was first established with the Westphalian State System. The system held legal personality and governmental power of the states as crucial elements, and the modern international system between states built on the main principles of the state sovereignty and national self-determination, non-interference in the domestic affairs of an external state, and equality between states. State immunity was seen as the key to isolate the administrative power of the states and prevent potential interference by other states.<sup>1</sup> Article 2 of the UN Charter also confirms the equality and self-determination principles with the intention to develop friendly relations among the nations.<sup>2</sup>

States usually utilize from two forms of immunity The restriction on the forum state’s ability to exercise jurisdiction over a foreign state is known as immunity from jurisdiction. In order to safeguard sovereign rights from outside intervention and to uphold the independence and dignity of states in the international sphere, immunity from enforcement forbids the forum state from applying any limitation orders on the foreign state.<sup>3</sup> The absolute form of sovereign immunity could not adapt to the necessity of the world order as the states began to engage in trading activities more. Immunity was providing an unfair advantage to states in competition with private institutions, so the restrictive theory of state immunity was improved. The activities of the state were categorized as sovereign and non-sovereign activities.<sup>4</sup> According to the restrictive approach, states are not immune from the cases arising out of the acts that can be carried on also by private actors such as commercial activities. However, the states are still immune to the claims arising out of governmental activities.<sup>5</sup>

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<sup>1</sup> Hazel Fox and Philippa Webb, *The Law Of State Immunity* (Oxford University Press 2013) 225.

<sup>2</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>3</sup> Eva Wiesinger, ‘State Immunity From Enforcement Measures’ <[https://deicl.univie.ac.at/fileadmin/user\\_upload/i\\_deicl/VR/VR\\_Personal/Reinisch/Internetpublikationen/wiesinger.pdf](https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wiesinger.pdf)> accessed 27 September 2022.

<sup>4</sup> Xiaodong Yang , *State Immunity in International Law* (Cambridge University Press 2012) 11-19.

<sup>5</sup> Lakshman Marasinghe, ‘The Modern Law Of Sovereign Immunity’ (1991) 54 *The Modern Law Review* 664, 681.



The head of state is responsible to exemplify the state among international relations, and take actions on behalf of it as the highest representative. The doctrine of the head of state immunity in international law forbids foreign state courts from exercising jurisdiction over the head of state of another nation. The heads of state benefit from this extended privilege as representatives which is in theory, granted to the states for the protection of sovereignty and enforcement of non-interference.<sup>6</sup>

Currently, there is no definite international convention that can be shown as the primary legal ground of the immunity utilized by heads of state. The scope of the Vienna Convention on Diplomatic Relations, 1961, is restricted with diplomats and diplomatic staff.<sup>7</sup> As the role of the head of state does not belong to this circle, it is not possible to reflect this Convention as the origin of heads of state immunity. Although Article 21 of the Convention of the Special Missions mentions the head of state immunity, the article points out the idea of the head of state immunity as an already existing concept.<sup>8</sup> The convention refers that the heads of state can benefit from the immunity granted to them by international law during the special missions in foreign states. For this reason, interpreting the article as a recognition of the immunity for a specific condition is a more appropriate approach than referring it as the primary legal basis of the immunity. The main aim of the article is to specifically indicate that immunity for the highest representatives is not precluded during the commission of the special mission.<sup>9</sup> The definition of the Convention on Jurisdictional Immunities of States and Their Property considers the instruments of the state in its definition and extends the state immunity to the representative when they are functioning for the official duties. However, the convention does not explicitly touch upon the concept of head of state immunity.<sup>10</sup> There is no particular written document to be counted as a legal basis immunity of highest officials, customary international law provides a sufficient legal basis for the procedural exemption of the head of state from the jurisdiction of the foreign states.<sup>11</sup>

Even though the Treaty of Westphalia highlights only the sovereignty of the state, the agreement also became the unofficial legal base for the immunity of heads of state. The modern system of international relations was accepting

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<sup>6</sup> Ramona Pedretti, *Immunity Of Heads Of State And State Officials For International Crimes* (2014) 13.

<sup>7</sup> Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Done at Vienna, April 18, 1961.

<sup>8</sup> United Nations, *Treaty Series*, Convention on Special Missions, 8 Dec. 1969, Article 21

<sup>9</sup> Pedretti (n 6) 33-35.

<sup>10</sup> UN General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004.

<sup>11</sup> Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815, 818.

the head of states as a part or instrument of the state. Therefore, any breach committed the head of the state was being considered as the breach of state.<sup>12</sup> Eventually, the criteria for the custom to originate is fulfilled with the common belief. In the case of *Lafontant v Aristide*, the US court ruled that the foreign heads of state have and protected by absolute immunity.<sup>13</sup> Many cases heard by national courts upheld the immunity of the head of state, but more importantly, the International Court of Justice has decided on the existence of the immunity of state representatives as custom.

The ICJ ruled that Belgium should have respected the immunity of the Democratic Republic of the Congo's minister of foreign affairs and should not have issued an arrest warrant. Belgium claimed that the benefitting from the immunities over the crimes against humanity is not possible. However, the court ruled for Belgium to revoke the arrest warrant and notify all authorities that they circulated this warrant. The judgment was final and binding for the parties. The decision of the court included that absolute immunity for an incumbent foreign minister even extends for committed international criminal acts. This principle also counts as valid and applicable to all other state officials and diplomats.<sup>14</sup>

## A. FORMS OF IMMUNITY

The personal immunity is granted only for the high-ranking state officials and provides a shield for both official and personal acts as the state officials would not be able to fulfill their international duties without the guarantee of not to be detained in a foreign country. The immunity even provides protection for the acts committed before the acquirement of the office. The main justifications are to provide the freedom and independence of both speeches and actions of the highest representatives and to enable peaceful international relations between states. The personal immunity stops when the official position of the relevant person is terminated. Therefore, the state official can only benefit from the functional immunity afterward.<sup>15</sup>

The functional immunity is directly linked to the act in question instead of the official person. For this reason, it does not end even though the person resigns from the office. The functional immunity doctrine is explained on the ground

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<sup>12</sup> Alina Kaczorowska-Ireland, *Public International Law* (2015) 355-356.

<sup>13</sup> *Lafontant v Aristide*, Ruling on motion to dismiss, 844 F.Supp. 128 (E.D.N.Y. 1994), ILDC 1677 (US 1994), 27 January 1994, United States; New York.

<sup>14</sup> *the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ).

<sup>15</sup> Riccardo Pisillo Mazzeschi 'The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories', (2015), 2 Questions of International Law 3, 4-6.

that the official acts by a representative of the state are actually acts of the state. The state representative shall only be seen as an instrument that undertakes the actions of the state on behalf of it. Consequently, the responsibility of the taken actions must belong to the relevant state instead of the individual.<sup>16</sup> The critical point is that nowadays functional immunity is not a direct obstacle for a legal proceeding. It requires the test to see whether the subject action of the case is attributable to the state or not.<sup>17</sup>

## B. WAIVER OF IMMUNITY

The immunity for the highest representative is given for the sake of the state, not for the personal advantage of the individual, so it can be waived by the state if necessary.<sup>18</sup> When the cases, concerning the waiver of immunity, are examined, the common state practices reflect that states are more prone to waive the immunity of the former heads of states in comparison to the incumbent head of state. The waiver of immunity is out of the question if the state does not express it clearly.<sup>19</sup>

## C. THE DRAFT WORK OF THE INTERNATIONAL LAW COMMISSION

As the concept of immunity from criminal jurisdiction is becoming a massive contradiction in international law, the International Law Commission started a draft work to create a convention for the issue in 2007. In 2017, the Commission provisionally adopted some draft articles of the fifth report. The provisionally adopted articles were also including the international crimes in which functional immunity could not be applied. In the meetings, that were held in 2018 and 2019 the Commission discussed the procedural aspects of the immunity.<sup>20</sup> In 2021, the Commission focused on the relation amid the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals in order to find solutions for the problems that arise in practice. As the International Law Commission is in charge of developing and codifying international law, even the draft articles can be pointed out as a guide. The draft work of ILC is still under the progress.<sup>21</sup>

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<sup>16</sup> Roger O’Keefe, ‘Immunity Ratione Materiae From Foreign Criminal Jurisdiction And The Concept Of Acts Performed In An Official Capacity’ 1,6-8.

<sup>17</sup> Mazzeschi (n 15) 25-30.

<sup>18</sup> Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 434.

<sup>19</sup> Pedretti (n 6) 82.

<sup>20</sup> ‘Chapter VII - Report Of The International Law Commission: Sixty-Ninth Session (1 May-2 June And 3 July-4 August 2017) (*Legal.un.org*).

<sup>21</sup> ‘Chapter VI - Report Of The International Law Commission: Seventy-Second Session (26 April-4 June and 5 July-6 August 2021) (*Legal.un.org*).

## II. APPROACHES OF THE NATIONAL COURTS CONCERNED

The state-centered order of public international law was recognizing the states as only the actors and the individuals were not involved as a part of this order. In this context, the individuals did not own any rights or obligations under international law. As the states are corporate bodies, they are not subject to similar punishments with individuals; the crimes attributed to them were remaining unpunished. However, with the rise of human rights law, the principle of individual criminal responsibility was also established over the commission of international crimes. In this regard, it must be noted that the immunities do not refer to the complete removal of legal liability but a procedural obstacle to the jurisdiction.<sup>22</sup>

Pedretti evaluated the criminal responsibility separately for distinct forms of immunity. The first evaluation is about the contradiction between the functional immunity and individual criminal responsibility. While functional immunity aims to direct the responsibility of the official acts to the state, individual criminal responsibility imposes the responsibility of the serious offenses over the individuals including state officials. As individual criminal responsibility is a more recent custom, some scholars argue that it overrides the custom of functional immunity. In contrast, others claim that there is no contradiction between personal immunity and the individual criminal responsibility as both concepts are different in nature. As specified by the verdict of ICJ in the Arrest Warrant case, the personal immunity can only be a procedural delay for the prosecution, which cannot contradict with the substantive nature of the individual criminal responsibility. To sum up, personal immunity can delay the prosecution for the period of incumbency but cannot completely exempt the individual from criminal responsibility.<sup>23</sup>

Immunities arising from international law must be separated from any immunity granted to the state officials by the domestic law of the origin state. Even though two concepts coincide with each other, their justifications and applications may differ from each other. The main difference is the state officials can rely on the immunity principle, which arises from the international law before the national courts of the foreign states. On the other hand, immunity arising from a domestic law is only reliable within the national law system of the relevant state.<sup>24</sup>

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<sup>22</sup> Jimena Sofía Álvarez, 'The Balance Of Immunity And Impunity In The Prosecution Of International Crimes' (*Fibgar.org*, 2016) <<https://fibgar.org/upload/publicaciones/28/es/the-balance-of-immunity-and-impunity-in-the-prosecution-of-international-crimes.pdf>> accessed 29 Sep 2022.

<sup>23</sup> Pedretti (n 6) 29-34.

<sup>24</sup> Antonio Cassese and others, *International Criminal Law: Cases And Commentary* (Oxford University Press 2011) 264.



The officials have no privileges in their national courts that arise from the international law. However, immunity from prosecution before the national courts of the origin state still exists in order to guarantee that heads of state act independently and effectively while carrying out their official responsibilities. While the immunity of the highest official before the foreign domestic courts is the issue of international law, immunity before the state of origin is the issue of domestic law. In this regard, some constitutions are providing absolute immunity; others are providing limited immunity. The rest of the countries do not have any codification about the domestic immunity of the officials.

When considering the approaches of the national courts of the foreign states over the concept, it must be noted that although a state has jurisdiction for every individual within its territory, the customary law brought a restriction for specific individuals. The head of state immunity concept aims to provide smooth international relations between the states.<sup>25</sup>

According to Akande and Shah, states have a consensus about the application of personal immunity and the principle even extends for the international crimes committed by serving heads of state. In this context, personal immunity before the foreign national courts is uncontroversial. State practices reflect that there is no evidence or attempt to challenge a serving head of state's immunity. So far, the only denial regarding the personal immunity of a head of state occurred in the case of *US v Noriega*. However, the reason for the denial is that the US was not even recognizing the de facto ruler of Panama as the official head of the state. Consequently, it did not recognize the personal immunity to General Noriega.<sup>26</sup>

Even though the *Democratic Republic of the Congo v. Belgium* case was about the arrest warrant established against the foreign minister of Congo, ICJ specifically underlined the applicability of the rule for the heads of state. The Arrest Warrant of 11 April 2000 was the first case in which the International Court of Justice decided about the immunity of high representatives of the state before a foreign national court. The ICJ confirmed that the immunity of high representatives is a custom, and there is no exception under customary international law to apply jurisdiction over the officials for the war crimes and crimes against humanity. Although, the ICJ decisions only bind the sides of the legal dispute, the Arrest Warrant decision has a guiding aspect regarding the issue. There is not enough state practice to form a custom of the denial of the personal immunity for international crimes before the foreign national courts.<sup>27</sup>

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<sup>25</sup> Salvatore Zappala, 'Do Heads Of State In Office Enjoy Immunity From Jurisdiction For International Crimes? The Ghaddafi Case Before The French Cour De Cassation' (2001) 12 *European Journal of International Law* 595, 600.

<sup>26</sup> Akande and Shah (n 11) 819-820.

<sup>27</sup> *the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ).



The controversial question about the immunity before the foreign courts is whether the heads of state will utilize from the functional immunity for the international crimes they committed during the incumbency.<sup>28</sup> International crimes are more severe in nature as they affect and harm large populations. In this regard, the core crimes are genocide, crimes against humanity, and war crimes. It has been argued that acts of international crimes are in contradiction with jus cogens norms and shall not be defined as sovereign acts. While some views claim that committing international crimes cannot be count as the function of the government officials, the opposite view argues that committing these kinds of serious crimes are not likely to be possible without the support of government policy.<sup>29</sup>

### A. PINOCHET CASE

The Pinochet case is regarded as the landmark in questioning the functional immunity of heads of state before foreign national courts. In 1998, Spain made an international arrest warrant for Pinochet and demanded the UK to extradite Pinochet to Spain for trial as the former president was being sued to be responsible for the murder, disappearance, kidnapping, and systematical torture of many people, including the citizens of Chile, Argentine, Spain, and Britain.<sup>30</sup> The Divisional Court decided that Pinochet was entitled to utilize from immunity against the legal proceedings including extradition.<sup>31</sup> The Commissioner of Metropolitan Police and the Government of Spain appealed against the decision before the House of Lords. In the first appeal, the Lords held that even though the heads of states are granted the functional immunity against the potential litigation that may start for the acts that they commit for their duties, the torture and hostage-taking could never be accepted as the functions of the heads of states. The majority of the lords approved the appeal and changed the decision of the Divisional Court. However, as Lord Hoffman was blamed not to be unbiased as he failed to declare his close link with Amnesty International Charity before taking the official position in the appeal, the decision was set aside.<sup>32</sup> In the second appeal, the House of Lords reapproved that Pinochet cannot utilize from the functional immunity for the

<sup>28</sup> Adil Haque, 'Immunity For International Crimes: Where Do States Really Stand? - Just Security' (*Just Security*, 2018) <<https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/>> accessed 30 Sep 2022.

<sup>29</sup> Akande and Shah (n 11) 817.

<sup>30</sup> Andrew D. Mitchell, 'Leave Your Hat On? Head Of State Immunity And Pinochet' (1999) 25 *Monash University Law Review* 225, 228.

<sup>31</sup> 'United Kingdom High Court of Justice, Queen's Bench Division (Divisional Court): In Re Augusto Pinochet Ugarte' (1999) 38 *International Legal Materials* 68.

<sup>32</sup> Antonio Cassese, *The Oxford Companion To International Criminal Justice* (Oxford University Press 2009) 874.

commission of the act of torture. The Lords argued that upholding functional immunity for officials would violate the duties of the parties under the Convention against Torture.

As the decision affected the judicial decisions in national courts, the Pinochet case is called as the Pinochet effect in the literature.<sup>33</sup> Even though the Geneva Convention of 1949 required states to enforce universal jurisdiction over the crimes against humanity and the war crimes, before the Pinochet case, national courts were not invoking the principle.<sup>34</sup>

Following the Pinochet case, Spain proceeded to establish arrest warrants for previous heads of state, including the two previous presidents of Guatemala. Spain is just one example from many.<sup>35</sup> In this context, the Pinochet case has an encouraging over the subsequent investigations of international offenses committed by the heads of state. However, the case was insufficient in setting up a principle of removing the functional immunity in concern of international crimes. This is due, in part, to the fact that the Pinochet decision found its legal basis from the universal criminal jurisdiction arising from the Convention against Torture. The states who are non-party to the convention do not have liability to comply with it. Furthermore, the party states to the convention are only liable to apply jurisdiction for the crime of torture.<sup>36</sup>

## **B. REPEALING OF THE UNIVERSAL JURISDICTION BY BELGIUM**

Although the removal of immunities is mainly the concern of domestic and international law, the additional consequence is also evident; judging the preceding or incumbent head of state of a foreign country causes political consequences that affect the relations between the states. The states which attempt to start legal proceedings for the issue are deterred by more powerful and more dominant states of international area. Belgium is one of the most evident examples of this.

In 1993, the Kingdom of Belgium codified the application of universal jurisdiction principles over both its domestic criminal law rules and international war crimes. The following year crimes against humanity and genocide were

<sup>33</sup> Naomi Roht-Arriaza, *The Pinochet Effect* (University of Pennsylvania Press 2011) 52.

<sup>34</sup> Veronica Diaz-Cerda, 'General Pinochet Arrest: 20 Years On, Here's How It Changed Global Justice' (*The Conversation*, 2018) <<https://theconversation.com/general-pinochet-arrest-20-years-on-heres-how-it-changed-global-justice-104806>> accessed 30 Sep 2022.

<sup>35</sup> Joanne Foakes, 'Immunity For International Crimes? Developments In The Law On Prosecuting Heads Of State In Foreign Courts' (*Chatham House*, 2011). <[https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111\\_foakes.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf)> accessed 30 Sep 2022.

<sup>36</sup> Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 *The American Journal of International Law* 731, 765-766.

also included within the scope of jurisdiction. The accepted principle was foreseeing to discard the status and title of the officials. Due to its universal nature, even the officials who do not reside in Belgium would be subject to the court's jurisdiction. Even though neither the victim nor the perpetrator had any relation to Belgium, the codification of universal jurisdiction in internal law allowed the victims to file a complaint before Belgian courts. Belgian law even refused the immunity of the incumbent head of state of the foreign country arising from the customary law. However, in the Arrest Warrant case, the ICJ ruled that Belgium was violating the customary law by establishing a warrant of arrest for Abdoulaye Yerodia Ndombasi.<sup>37</sup>

Several Iraqi families demanded jurisdiction against former US president George W. Bush in Belgium in 2003. The families were claiming that the 1991 bombing of a civilian air raid shelter in Baghdad, which resulted in the murder of their family, was the fault of George Bush and a few other former US officials. In response to this complaint, the US began to put pressure on Belgium by threatening to move the NATO headquarters out of Belgium. Even Belgium, which can be called as a progressive country regarding the universal protection of human rights, could not bear the pressure and quickly removed the universal jurisdiction provisions. According to current Belgian law, the judiciary has the authority to reject applications from individuals apart from Belgian nationals and individuals who lived in Belgium minimum three years.

### C. GADDAFI CASE BEFORE THE COURT OF CASSATION

The Cour de Cassation upheld Muammar Gaddafi's immunity under customary international law in the case it heard against the Libyan leader. Despite the fact that France is a signatory to the Rome Statute, the Court of Cassation noted that this circumstance should not be interpreted to indicate a responsibility to apply jurisdiction in all situations. Also, the accusations were about the act of terrorism, which is not included in the Rome Statute's list of international crimes. Although Gaddafi did not come to power via the formal procedures in Libya, his personal immunity as *de facto* head of state arising from the customary law was confirmed by the Cour De Cassation.<sup>38</sup>

The states are still respecting the personal immunity of acting foreign heads of state even in the commission of the international crimes. The reason for this protection is the consideration of the possible critical results of taking legal action against an acting official of a foreign country. The attempt for jurisdiction is likely to result in a political crisis and harmed international relations.

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<sup>37</sup> Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics' (2003) 25 *Cardozo L Rev* 247, 248-255.

<sup>38</sup> Zappala (n 25) 598-601.



However, following the Pinochet case, states began to develop an understanding that the immunity from jurisdiction must be temporary, and the officials shall not be allowed to avoid the consequences of committing international crimes after their term of office. Functional immunity cannot be used as a defense against international crimes. In this regard, it is crucial to determine if the act was carried out as part of the official responsibility or at the individual's choice. The opposite view argues that for a head of state to commit serious crimes, the government policy is needed to be set accordingly. Regarding the acceptance or rejection of functional immunity in the conduct of international crimes, the states are still unable to reach a consensus. There is no sufficient state practice to establish a custom. In addition to legal considerations, also political pressure may prevent states from denying the existence of either type of immunity

### III. THE EFFECTS OF POST-WESTPHALIAN WORLD ORDER OVER THE CONCEPT

The Westphalian order secularized international politics and rooted it in the principles of national interests. Also, it introduced the idea of sovereignty without any higher authority standing above the states. It embraced a view of an international society founded on the equality of the states and regarded the states as supreme sovereign authorities within their territories with lawful authority over all inhabitants.

In the increasingly globalized and cosmopolitan world, sovereignty has been eroding as the nation-states have integrated themselves into a complex web of global governance that includes regional and international organizations, transnational and subnational organizations, multinational corporations, non-governmental organizations, citizen movements, and individuals who have emerged as independent actors with the potential to challenge states. Additionally, the field of international relations has broadened by addressing new subject matters. The field has been expanded to include human rights, gender, women, the environment, democratization, population movements, and energy politics among many other subjects. Also, the focus of international relations shifted from only state-to-state interactions to interactions between states and sub-national and supra-national actors as well.<sup>39</sup>

The main character of world order as provided in the Treaty of Westphalia remained unchanged until World War I. Since then the structure of the world order began to change significantly and still progressing.<sup>40</sup> Hence, the traditional

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<sup>39</sup> Ebru Ogurlu, 'Understanding the Distinguishing Features of Post-Westphalian Diplomacy' (2019) 24 *Perceptions: Journal of International Affairs* 175, 176-177.

<sup>40</sup> Kenneth Carlston, 'World Order And International Law' (1967) 20 *Journal of Legal Education* 127, 131.

international law approach also started to change with the appearance of new actors and the improvement of new substantive norms such as human rights law. In this era human rights highlighted as a more sacred value than sovereignty.<sup>41</sup>

According to Falk, Westphalian world order was uniting the idea of equal states with the reality of geopolitical and hegemonic inequality. Hague Conferences of 1899 and 1907 were reflecting the idea that as a consequence of the interacting sovereign states, the war was actually part of the Westphalian world, and the peace could only be sustained through stateless world order. Although, the so-called utopia of stateless world order has not yet achieved, beginning from 1990 the ongoing process of globalization has become the key factor in understanding the current world order. The process also called as the end of sovereign states in literature which symbolizes that the states lost power in their institutional autonomy. As a matter of fact, democracy and human rights stand out as universal values, causing the emergence of concepts that can be considered more sacred than sovereignty has been.<sup>42</sup>

By the 21st century, the world order completely depending on the sovereign states converted with the rise of European regionalism, the invention of weapons of mass destruction, the establishment of international organizations, the rise of global market forces, and the form of global civil society. The state-centered and military-oriented sense of security began to be reconsidered during the post cold war period with the effect of the globalization process. Despite all changes, it would be incorrect to deny the presence of the sovereign states as the world order is still composed of them. However, the state and sovereignty concepts are being transformed by globalization, accordingly, the acts and preferences of the state are determined and limited by the powers beyond the territory of the sovereign.<sup>43</sup>As the Westphalian world order is changing according to some views immunities must be limited or even abolished for the purpose of preventing grave violations of human rights. On the other hand, the opposite view argues that considering the pluralization of the actors in the globalized world, even the scope of individuals protected by immunities must be extended.

The Treaty of Versailles was the first act to call into question the criminal responsibility of the head of state for serious infringements of international law. Unfortunately, the first questioning ended up with a failure. Also, the attempt to judge Wilhelm II for the atrocities committed during the World War I was not successful as there was not enough legal framework for the judgment and Holland refused to extradite Wilhelm II due to his official status as a head of state. After the second world war, another attempt came up to undermine

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<sup>41</sup> Rosanne Alebeek, 'Immunity And Human Rights? A Bifurcated Approach' (2010) 104 American Society of International Law 66, 67.

<sup>42</sup> Richard Falk, *The Declining World Order* (Taylor and Francis 2004) 6-10.

<sup>43</sup> *ibid* 12.

the immunity of the state's high representatives. The victors of the war set up the international military tribunals of Nuremberg and the Far East. The legal framework for the tribunals specifically stated the criminal responsibility of the head of state and denial of immunity in concern of crime against humanity, crimes against peace and war crimes. However, both international military tribunals were unable to try the head of states committed these crimes. The fundamental human rights and freedoms are secured following the end of World War II.

### A. HUMANITARIAN INTERVENTIONS IN THE POST-COLD WAR ERA

Under the Charter of UN, the Security Council's responsibility is defined as maintaining peace and security universally. Accordingly, the council is granted the authority to decide on the measures that must be established to sustain or bring back peace and security at an international level.<sup>44</sup> The Security Council was effective in resolving conflicts of the post soviet era when the members' veto power was ended. The conflicts arising within the states have reduced the power of the anti-interventionist structure of the international community. As a response to this situation, during period of the aftermath of the Cold War, the concept of humanitarian intervention started to rise at once in order to end serious human rights violations.<sup>45</sup> The legitimacy of these interventions was controversial because according to the non-intervention principle, any interference in the domestic affairs of a state is not allowed. On the other hand, states and international organizations shall not ignore the violation of human rights during the ongoing civil wars, genocide, and ethnic cleansing.

Apart from the self-defense or being authorized by the Security Council for the aim of restoration of peace and security, Article 2(4) of the UN Charter prohibits the states from the threat or use of force against the territorial unity or political freedom.<sup>46</sup> In total, ten interventions took place with or without the UN authorization in this era. The security council authorized the interventions in Rwanda, Somalia, Bosnia, Albania, Haiti, and East Timor. Among these states, four host governments gave their consent to the UN for the intervention, so interventions were unproblematic from the legal perspective. However, it must be noted that the interventions in Haiti and Somalia took place without state consent. This situation was analyzed as the reflection of the UN's authority over humanitarian interventions as it was seen as the appropriate body for authorization.

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<sup>44</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Pg 7.

<sup>45</sup> 'The United Nations: 'Fifty Years Of Keeping The Peace' (*Crf-usa.org*, 2020) <<https://www.crf-usa.org/bill-of-rights-in-action/bria-12-3-a-the-united-nations-fifty-years-of-keeping-the-peace>> accessed 03 Oct 2022.

<sup>46</sup> United Nations, *Charter of the United Nations*, 1945.

However, during the same period, interventions have started without the official permission of the security council. The Economic Community of West African States carried out an intervention to Liberia to prevent the killings of civilians in 1990. The US, UK, and France proclaimed no-fly zones in Iraq intending to protect ethnic Kurdish minority and Shiite Muslims. ECOWAS also intervened in Sierra Leone in 1997 to protect human rights. Even though all these interventions took place without the Security Council's authorization, the international community's responses were positive. They were justified on the grounds of following the Security Council's resolution. Among all the interventions that took place in the 1990s, the NATO intervention in Yugoslavia is highlighted as the most controversial about the authority over the evolution of the state practices.<sup>47</sup> NATO justified the actions taken as some crimes are so extreme that the state becomes responsible for them, and military intervention can take place even though the intervention violates the principle of sovereignty.<sup>48</sup>

Justifying the foreign state's interventions on the grounds of the Security Council's resolutions, paved the way for violating the non-intervention principle without facing any legal consequences. The humanitarian intervention in the post-cold war era can be defined as the first significant step of limiting the sovereignty of the states. Significantly, Yugoslavia conflicts granted a new basis for the way the international community deal with internal conflicts of a nation.<sup>49</sup> The interventions were the signs of shifting from Westphalian to the Post-Westphalian era by undermining the main principles of the Westphalian order and weakening of the sovereignty may be interpreted as the weakening of the privileges arising from sovereignty.

## **B. THE COURTS ESTABLISHED BY THE UN SECURITY COUNCIL**

The UN Security Council established the International Criminal Tribunal for Rwanda and The International Criminal Tribunal for the former Yugoslavia respectively relying on Article 39 and Article 41 of the UN Charter. The terrific events in both countries were interpreted as the international community's failure to prevent atrocity crimes. Both tribunals were arranged in ad hoc nature to prosecute perpetrators of serious offenses. The establishment of the tribunals was an important step in the reconsideration of the state official's

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<sup>47</sup> Cristina Gabriela Badescu, *Humanitarian Intervention And The Responsibility To Protect: Security And Human Rights* (Routledge 2010) 60-69.

<sup>48</sup> Adam Roberts, 'NATO's 'Humanitarian War' Over Kosovo' (1999) 41 *Survival* 102, 103.

<sup>49</sup> Scott Grosscup, 'The Trial Of Slobodan Milosevic: The Demise Of Head Of State Immunity And The Specter Of Victor's Justice' (2004) 32 *Denver Journal of International Law & Policy* 355, 356.

criminal responsibility, including the heads of state when they commit core crimes. The statutes of the ICTR and ICTY both deny the immunities granted to state officials. The member states of the UN were liable to associate with the decisions of the tribunals. For this reason, the member states under the jurisdiction of the courts, are counted as accepting to waive immunity for the officials who committed international crimes.<sup>50</sup>

Slobodan Milošević was the first head of state who is judged before an international court with the claim of committing war crimes. The trial is interpreted as the turning point for international justice.<sup>51</sup> In Milošević's case, it's challenging to analyze the situation personal immunity for international crimes because when Milošević was brought before the court, he already gained the status of the former president. However, a similar and recent trial of Charles Taylor supports the idea that although the incumbent head of state is still granted absolute immunity by the national courts, this situation is different before the international and internationalized courts. The international courts deny the acting head of state's personal immunity in the commitment of the grave violations of human rights as also clearly stated in the statute of the ICTY.<sup>52</sup> Even though, Milošević tried to benefit from functional immunity as a former president, he benefits from the functional immunity, the Trial Chamber clarified that putting forward the official status as an obstacle before the jurisdiction for the crimes falling under the scope of court is invalid even for the heads of state. <sup>53</sup>Milošević's trial was an important step in reflecting individual criminal responsibility of the heads of state in the commission of international crimes.

Following the civil war, the president of Sierra Leone requested the UN Security Council to create the Special Court of Sierra Leone. In this regard, an agreement between the Government of Sierra Leone and the UN Security Council led to the establishment of the Special Court of Sierra Leone as a hybrid international-domestic court, also known as an internationalized court.<sup>54</sup> The court is established to prosecute the perpetrators of international crimes

<sup>50</sup> Dapo Akande, 'International Law Immunities And The International Criminal Court' (2004) 98 *The American Journal of International Law* 407, 417.

<sup>51</sup> 'Slobodan Milošević Trial - The Prosecution's Case | International Criminal Tribunal For The Former Yugoslavia' (*Icty.org*, 2020) <<https://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case>> accessed 05 Oct 2022.

<sup>52</sup> Chiara Ragni, 'Immunity of the Heads of State: Some Critical Remarks on the Decision of the Special Court of Sierra Leone in the Charles Taylor Case' (2004) 1 *Italian Year Book of International Law* 273, 274.

<sup>53</sup> Udoka Nwosu, 'Head Of State Immunity In International Law' (*Etheses.lse.ac.uk*, 2011) <[http://etheses.lse.ac.uk/599/1/Nwosu\\_head\\_state\\_immunity.pdf](http://etheses.lse.ac.uk/599/1/Nwosu_head_state_immunity.pdf)> accessed 18 Oct 2022.

<sup>54</sup> Charles Chernor Jalloh, 'Special Court of Sierra Leone: Achieving Justice?' (2010) 32 *Mich. J. Int'l L.* 395, 398.



and the committed acts which constitute crimes under Sierra Leonean law.<sup>55</sup> The scope of the jurisdiction was including the highest officials the court statute clearly indicates that “the official position of the accused person whether the head of state or a government official shall not relieve that person from the criminal responsibility.”<sup>56</sup>

The SCLS indicted Charles Taylor for crimes against humanity. Followingly, an arrest warrant has been issued during his visit to Gana. However, Gana did not co-operate with the arrest request. Taylor referred a motion against the decision of the court and demanded immunity on several reasonings which also included ICJ’s decision on the Arrest Warrant case. Taylor argued that he was also the incumbent president of Liberia and had personal immunity when the indictment is issued. The Appeals Chamber declined the motion and stated that the Special Court of Sierra Leone is not a national court, therefore the decision on the Arrest Warrant is not related to the indictment. The court concluded the decision as the sovereign equality does not preclude an international court from prosecuting a head of state.<sup>57</sup> After his resignation, Taylor was extradited from Nigeria where he was hiding to Liberia and arrested by the peacekeeping forces. The Trial Chamber convicted Charles Taylor for 50 years in prison.<sup>58</sup>

Although Taylor was a former head of state during the trial, he was acting president when the SCLS issued an indictment against him. For this reason, the trial carries importance regarding the individual criminal responsibility of the incumbent heads of state.

#### IV. HEAD OF STATE IMMUNITY AND THE INTERNATIONAL CRIMINAL COURT

After the adaption of the Convention on the Prevention and Punishment of the Crime of Genocide, the UN General Assembly realized the necessity for a permanent criminal court for the aim of dealing with international crimes. Despite all criticisms, ad hoc tribunals had a catalyzer impact on the establishment of the International Criminal Court. The drafters included most of the features of the formerly established ad hoc courts in the Rome Statute.<sup>59</sup> Contrarily, the different characteristics of the court also arise from the legal basis it relies on.

<sup>55</sup> Michael Scharf, ‘The Special Court For Sierra Leone | ASIL’ (*Asil.org*, 2000). <<https://www.asil.org/insights/volume/5/issue/14/special-court-sierra-leone>> 11 Oct 2022.

<sup>56</sup> Statute of the Special Court for Sierra Leone 2002.

<sup>57</sup> Bartram S Brown, *Research Handbook On International Criminal Law* (Edward Elgar 2012) 246.

<sup>58</sup> ‘The Special Court For Sierra Leone, The Residual Special Court For Sierra Leone - The Prosecutor vs. Charles Ghankay Taylor’ (*Rscsl.org*, 2020) <<http://www.rscsl.org/Taylor.html>> accessed 14 Oct 2022.

<sup>59</sup> Stuart Ford, ‘The Impact Of The Ad Hoc Tribunals On The International Criminal Court’ [2018] SSRN Electronic Journal 1, 2.



The International Criminal Court is established by the Rome Statute, which is a multilateral treaty between states. The creation of an international permanent court was one of the major events that shaped the contemporary international legal order. Although the Rome Statute was negotiated within the UN, the International Criminal Court is an independent judicial institution with the international legal personality. However, UN Security council has the authority to refer the situations for the jurisdiction of ICC when necessary.<sup>60</sup>

The crimes fitting within the jurisdiction of the ICC is determined as crimes against humanity, the crime of genocide, war crimes, the crime of aggression.<sup>61</sup> The ICC functions according to the complementarity principle which gives the priority for the jurisdiction to the national courts.<sup>62</sup> The states are giving consent for the jurisdiction of the ICC when becoming a party to the Rome statute. The court has the authority to exercise jurisdiction if the perpetrator is the national of the state party or the crime took place within the territory of the party-state.

The states which are not a party to the treaty can also admit the jurisdiction of the court. In this context, the ICC becomes eligible to apply jurisdiction over the non-party state national if the individual perpetrated the crime within the territory of a party state or within a state that admitted the scope of authority of the court. The jurisdiction of the ICC is individual criminal responsibility oriented and the Rome Statute denies the exemption from the prosecution due to the function or the position of the individual.<sup>63</sup> Thus, the effectiveness of the ICC also relies on the cooperation of the states as the institution has no police force or military to investigate crimes and arrest individuals. Article 86 of the Rome Statute appoints the duty over state parties for the general commitment of collaboration. Respectively, Article 88 defines the responsibility of parties to adjust their domestic laws to permit cooperation with the court.<sup>64</sup> Generally, a large number of people are involved in the commission of international crimes. However, as seen by the ad hoc tribunals established by the UN Security Council, the ICC also focuses on the masterminds and coordinators of the international crimes among the perpetrators.<sup>65</sup> Article 27 (2) of the statute denies

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<sup>60</sup> Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices' (2013) 24 Criminal Law Forum 417,419.

<sup>61</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

<sup>62</sup> Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem' (2010) 8 Santa Clara Journal of International Law 165, 176-177.

<sup>63</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (1998).

<sup>64</sup> Valerie Oosterveld, Mike Perry and John McManus, 'The Cooperation Of States With The International Criminal Court' (2001) 25 Fordham International Law Journal 767, 768.

<sup>65</sup> Barbara Goy, 'Individual Criminal Responsibility Before The International Criminal Court'

any immunities arising from national or international law so the immunities of the state officials end where the individual criminal responsibility for the core crimes arises.<sup>66</sup>

### A. THE CO-OPERATION LIABILITY OF STATES

The formation of the ICC has been the success of international criminal law and human rights law. However, according to its different structure, the court cannot work effectively without the co-operation of the states. The ICC is not authorized to judge individuals unless they become present in the courtroom. The lack of state co-operation results with the inability of the ICC to investigate, arrest, and apply jurisdiction because no police or military forces are working under the command of the court. The obligations require the absolute cooperation of party states with the court. To fulfill their cooperation liability party states must harmonize their national laws with the procedural framework foreseen by the Rome Statute.<sup>67</sup>

Article 87 mentions that the court may also ask for the assistance of a non-party state relying on an ad hoc agreement. Due to the correlation between UN Security Council and the ICC, even the non-party states may have a compulsory duty to collaborate with the court. The competence of the Security Council comes from the UN Charter, so its verdicts are obligatory on the UN member states. As the ICC has a complementary role, apart from the prosecutor, also the member states and party states or the UN Security Council refer to trigger the jurisdiction of the court. In this regard, the Security Council owns the power to authorize a state to cooperate with the ICC when it refers a case to the jurisdiction of the court to maintain world peace. Although the treaty only reflects the voluntary co-operation of the non-party states, in the practice with the authorization the UN Security, the non-party states also act with a mandatory obligation towards the ICC.<sup>68</sup>

In the case of the failure to conform with the demand of cooperation and prevent the court from enforcing its functions, the ICC can assign the issue to the Assembly of State Parties or the UN security council. By becoming a party of the Rome Statute, the states waive the head of state immunity arising from the customary international law. There is no confusing element about the implied waiver of immunity for the official who is accused by the ICC when he is found within the territory of the state party where he/she is a citizen. In this case, the national jurisdiction still has priority, but apart from that, the party-

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(2012) 12 International Criminal Law Review 1, 7-9.

<sup>66</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (1998).

<sup>67</sup> Oosterveld, Perry and McManus (n 65) 835.

<sup>68</sup> Zhu Wenqi, 'On Co-Operation By States Not Party To The International Criminal Court' (2006) 88 International Review of the Red Cross 87, 90-92.



state is obligated to detain and hand over the official to the ICC's jurisdiction. A similar approach shall be followed by the foreign party states if the accused official of another state party is found within its territory. The foreign state party arrests and surrenders on behalf of the ICC. By doing that, they do not breach the customary rule as both states are accountable for the obligations of the Rome Statute.<sup>69</sup>

The main contradiction begins when the immunity of the non-party state officials becomes the subject of the cooperation. The officials of non-party states are still subject to immunity arising from customary international law, and the other states are obliged to respect their immunities.<sup>70</sup> Additionally, the Rome Statute validates the circumstance by stating that "the court may not proceed request that would require the party-state to act inconsistently with its obligations arising from international law."<sup>71</sup> However, the recent practices of the ICC regarding the resolutions of the Security Council in Darfur and Libya is completely different from the provisions of Article 98.

## B. AL-BASHIR CASE

In regards to broad-scale atrocities and human rights abuses that took place against civilians in Darfur, the Security Council established a resolution which was including the requirements to be met by the Government of Sudan. The resolution was also stating that in the case of failure to comply with the security council, the council will consider taking further action.<sup>72</sup> As the Government of Sudan did not act within the framework of the resolution, another resolution is established by the UN Security Council. This time the Security Council demanded the formation of the international commission of consultation to investigate the category of the crimes within the framework of the humanitarian law and the human rights law. The investigators considered whether the policy of genocide was followed or not, rather than individual intents of the perpetrators. According to the report submitted by the investigators, the acts were not falling under the applicability extend of the crime of genocide. The Government of Sudan and the rebel military group Janjaweed were both found responsible for the commitment of the crimes against humanity and the war crimes. Senior government officials were also found responsible under the notion of command.<sup>73</sup> The resolutions of the UN and the report of investigation

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<sup>69</sup> Akande (n 51) 419-428.

<sup>70</sup> Fox and Webb (n 1) 1869- 1871.

<sup>71</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (1998).

<sup>72</sup> UN Security Council, Security Council resolution 1556 (2004).

<sup>73</sup> Report Of The International Commission Of Inquiry On Darfur To The United Nations Secretary-General Pursuant To Security Council Resolution 1564' (*Un.org*, 2020). <[https://www.un.org/ruleoflaw/files/com\\_inq\\_darfur.pdf](https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf)> accessed 15 Oct 2022.

are crucial as they laid the foundation for the ICC to apply jurisdiction over the event. Sudan is not a party to the treaty so the ICC could not start a verdict without the referral of the security council.

The further resolution 1593 established by the council which assigned the cases that occurred in Darfur to the ICC.<sup>74</sup> The prosecutor applied to the pre-trial chamber of ICC to publish an arrest warrant with the aim to bring the President of Sudan for the jurisdiction. In his application, the prosecutor mentioned that the acts of genocide are taking place and Omar Hassan Bashir is liable for the ranging international crimes as the mastermind.<sup>75</sup> The pre-trial chamber agreed on the reasonable demonstration which shows the suspect that Al Bashir was an indirect co-perpetrator for war crimes and crimes against humanity and issued the arrest warrant against Al Bashir in 2009. Thus, the warrant was not including the crime of genocide within the listed crimes. The warrant established towards Al Bashir is crucial as it is the first arrest warrant established by the ICC against an acting head of state.

Followingly, the ICC established a cooperation request to party state Malawi when Al Bashir was within the territory of the state. However, Malawi rejected the cooperation request relying on Article 98.<sup>76</sup> The pre-trial chamber evaluated the attitude of Malawi, as a defect in collaborating with the obligations of the statute and accordingly refused the justification of Malawi which based on Article 98. Malawi contended that the non-party status of Sudan is to the Rome Statute still protects immunity of the president Bashir arising from the international customary law. The pre-trial chamber refused Malawi's argument which was relying on an exception arising from the customary international law and referred the non-cooperation to the Assembly of State Parties and the UN Security Council.<sup>77</sup> The ICC was relying on the resolution 1593 as justification for its decision. According to the pre-trial chamber, the referral by the security council also renders the immunities.<sup>78</sup> The decision of the pre-trial chamber is evaluated as unclear by scholars as it completely denies the conflict between article 27 and article 98 in case of arresting and surrendering of Bashir as the

<sup>74</sup> 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court' Meetings Coverage And Press Releases (*Un.org*, 2020) <<https://www.un.org/press/en/2005/sc8351.doc.htm>> accessed 18 Oct 2022.

<sup>75</sup> Roza Pati, *Due Process And International Terrorism* (Martinus Nijhoff Publishers 2009) 161.

<sup>76</sup> Dire Tladi, 'The ICC Decisions on Chad and Malawi' (2013) 11 *Journal of International Criminal Justice* 199, 200-203.

<sup>77</sup> Rebecka Buchanan, 'Obligations Of State Parties To Arrest And Surrender Omar Al-Bashir' (*Human Security Centre*, 2020) <<http://www.hscentre.org/global-governance/bashir-still-large-obligations-state-parties-arrest-surrender-bashir/>> accessed 20 Oct 2022.

<sup>78</sup> Guénaél Mettraux, John Dugard and Max du Plessis, 'Heads Of State Immunities, International Crimes And President Bashir's Visit To South Africa' (2018) 18 *International Criminal Law Review* 577, 579.



acting president of the non-party state who is granted immunity by customary international law.<sup>79</sup>

The second arrest warrant established towards Al Bashir by the ICC, which additionally compromised the crime of Genocide. By including the crime of genocide, the court imposed an additional obligation on the states via the Genocide Convention as the convention mentions the liability of states to collaborate with international courts to arrest the suspects of the crime of genocide.<sup>80</sup>

In 2017, the ICC requested Jordan to cooperate with the arrest and surrender request regarding Al-Bashir while he was visiting Jordan. Jordan also argued that Al Bashir is benefitting from the sovereign immunity as acting head of state of Sudan and the immunity is not waived by either the customary international law or the UN Security Council Resolution. Consequently, Jordan refused the application of waiver the immunity over the third country which is non-party to the Rome Statute. Moreover, the reasoning was also including that the resolution by the security council also did not suspend the customary duty to act with respect to the immunity granted for a foreign head of state, even though it had the power to do so arising from Chapter 7 of the UN Charter. The ICC refused the defense of Jordan and stated that Jordan, as a state party to the Rome Statute, was liable to arrest and surrender Al-Bashir on the cooperation request by the court.<sup>81</sup>

The ICC referred Jordan to the Assembly of State Parties and the UN Security Council as a result of the non-cooperation.<sup>82</sup> Jordan appealed against the decision before the ICC Appeals Chamber. Appeals Chamber decided that the heads of state do not have any immunity arising from the customary international law which precludes them from the criminal prosecution of international courts. Accordingly, they have no immunity from arrest and surrender by foreign states which are actually acting on behalf of the ICC. For this reason, Jordan failed to fulfill its obligation under the Rome Statute, however by the majority of votes the Appeals Chamber changed the referral decision of the pre-trial chamber.<sup>83</sup>

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<sup>79</sup> Buchanan n (77).

<sup>80</sup> Saher Valiani, 'Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar Al-Bashir' (2017) 35 Berkeley Journal of International Law 150, 161-168. Göran Sluiter 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 Journal of International Crime and Justice 365, 366-367.

<sup>81</sup> Victor Tsilonis, *The Jurisdiction Of The International Criminal Court* (Springer 2019) 179.

<sup>82</sup> 'Al-Bashir Case: ICC Pre-Trial Chamber II Decides To Refer Jordan's Non-Cooperation To The ASP And UNSC' (*Icc-cpi.int*, 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1349>> accessed 28 Oct 2022.

<sup>83</sup> John Oltean and Nicholas Zebrowski, 'ICC Appeals Chamber Judgment On Jordan: Analysis And Implications On The Question Of Immunity' (*International Justice Monitor*, 2020)

Bashir obtained the capacity in Sudan by a military coup d'état, his dismissal from the office occurred by another military coup d'état. Bashir was arrested by the Government of Sudan. After the jurisdiction of national courts, in February 2020, the Government of Sudan accepted to hand over Al-Bashir to the ICC for the jurisdiction of international crimes.<sup>84</sup> The case became an important key to evaluate the level of effectiveness of the ICC and reflected that party states are avoiding to comply with the arrest and surrender requests of the court when the immunity of the highest state officials is concerned.

### C. GADDAFI CASE

As a result of systematic violence by the governmental forces in Libya, the UN Security Council established the resolution 1970 which is followed by the transfer of the events for the jurisdiction of the ICC as the violence against the civilians was falling under the scope of crimes against humanity. As the attacks were taking place by the forces under governmental control, the ICC established an arrest warrant against Muammar Mohammed Abu Minyar Gaddafi. The arrest warrant also touched upon the immunity arising from customary international law, as Libya was not party state of the Rome Statute. The pre-trial chamber followed a similar approach with Al-Bashir's case and justified the establishment of an arrest warrant against the official of non-party state depending on the referral by the UN Security Council.<sup>85</sup> However, the arrest warrant was withdrawn within the same year due to his death.<sup>86</sup>

In similar cases regarding the immunity of the non-party state officials, the ICC followed a similar approach. By relying on the resolutions of the UN Security Council, the ICC completely denied the privileges of acting head of states. The justification of ICC mainly relies on the fact that state officials do not have any privileges which arise from customary international law that will protect them from the jurisdiction of international courts.<sup>87</sup>

On the other hand, the ICC is having difficulties while trying to meet with the expectations as it mainly relies on the cooperation of the party states. The

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<<https://www.ijmonitor.org/2019/05/icc-appeals-chamber-judgment-on-jordan-analysis-and-implications-on-the-question-of-immunity/>> accessed 29 Oct 2022.

<sup>84</sup> 'Sudan Agrees Bashir Must Face International Court' (*BBC News*, 2020) <<https://www.bbc.com/news/world-africa-51462613>> accessed 03 Nov 2022.

<sup>85</sup> Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', Decision of the Pre-Trial Chamber I, 27 June 2011.

<sup>86</sup> 'Situation In Libya' <<https://www.icc-cpi.int/libya>> 05 Nov 2022.

<sup>87</sup> 'The Role Of The International Criminal Court In Ending Impunity And Establishing The Rule Of Law' (*Unchronicle.un.org*, 2012). <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> 07 Nov 2022.



authority of the ICC only works if the states recognize its authority or UN Security Council refers the situation to its jurisdiction. This situation extremely limits the functioning ability of the ICC as even the member states refuse to cooperate with the court by offering the customary law as an excuse for the failure to arrest the highest representatives. Moreover, the world's major powers; US, China, Russia are not even party to the Rome Statute.<sup>88</sup> As the ICC started to investigate the situation in Ukraine, the scholars began to evaluate the possible arrest Russian president Vladimir Putin. From previous cases, it is clear that without the support of the home state, the president's arrest and surrender to the ICC will be highly challenging.<sup>89</sup> The crucial effect of state cooperation is reflected in the Al-Bashir case. In this regard, the attempt of the ICC to remove the head of state immunity to end impunity still relies on state practices.

## CONCLUSION

In this study, the concept of the head of state immunity over the criminal jurisdiction in the post-westphalian era is evaluated by the examination of changes in international law area and the practices of the differently structured courts.

The result of case evaluations reflected that the foreign national courts are still actively respecting the absolute personal immunity of the incumbent heads of state with the aim to protect international relations and avoid political consequences. From the perspective of the national courts, individual criminal responsibility idea mostly affected the functional immunity of the head of states. After the Pinochet case many states developed a similar belief that even though the heads of state have immunity as a procedural obstacle against the legal proceedings, their exemption from the prosecution in the commission of the international crimes shall not be eternal. For this reason, the practices of some states turned into not recognizing any functional immunity for the former officials in the commission of international crimes as they believe that the acts of international crimes cannot be official acts. However, the states could not sustain the consensus about functional immunity yet as the opposite view argues that a head of state cannot commit an international crime without the support of government policy. Although the Pinochet effect significantly reduced the effectivity of the functional immunity against international crimes before foreign national courts, there is no enough state practice to form a custom.

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<sup>88</sup> Andrew Henderson, 'Six Countries That Aren't Part Of The ICC' (*Nomad Capitalist*, 2020) <<https://nomadcapitalist.com/2018/08/29/countries-arent-part-of-icc/>> accessed 10 Nov 2022.

<sup>89</sup> Aghem Hanson Ekori and Paul S. Masumbe, 'Putin on Trial: the Reality of Head of State Immunity before International Criminal Court' (2022) 2 *Polit Journal: Scientific Journal of Politics* 29.



In comparison to national courts, the practices that are foreseen by the international courts against international crimes are more strict about both forms of immunity. The statutes of ad hoc and permanent criminal courts deny the existence of both forms of immunity which are related to the heads of state in the commission of international crimes. As an intergovernmental organization, the United Nations had an essential role in sustaining the grounds for the jurisdictions of the ad hoc tribunals of ICTY and ICTR. The first trial towards a head of state has been carried out after the post-cold war era by ICTY. In this regard, it can be said that ad hoc tribunals had been successful in denial of the immunity of the heads of state. However, as the ad hoc tribunals were established for the specific purposes and areas, their scope of jurisdiction was limited with these events and areas. Although the ICC is dedicated to end the impunity against the international crimes with the support of the security council, as the court has no executive powers and trigger mechanism, this creates many obstacles towards the dedication of the court.

To sum up, the ICC provided the necessary legal basis to make the head of the state immunity concept completely ineffective in the commission of international crimes. However, as the arrest and surrender rely on state cooperation, the court is having difficulties to fulfill its duties. In this regard, the formation of the court was a major step to end impunity and provide global justice, however as the states are avoiding to cooperate with the court, the measures which are taken by ICC are remaining ineffective.

Although the sovereign states lost significant power in the era of globalization, the complete ineffectiveness of the head of state immunity concept is still relying on the states' will. If the states wish to end the immunity they have the power to do so by reaching a consensus, if not the heads of state will remain untouchable even before the ICC.

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