

Chapter I

Theoretical basis for immunity in international criminal law

1. Subjective scope of immunity in international criminal law

a. Typology of the notion: functional and personal immunity

The international arena on its legal level is filled with relations of various kinds, connections between the numerous subjects of international law. From the point of view of customary law each of them is to be treated equally, with no discriminative measures applied. This relates to the states as well as internationally recognised organisations and other members of the community, whose scope has been broadly discussed by scholars in literature.¹ Recent developments of international law, such as the acceptance of the rule of individual criminal responsibility, proved that this community has expanded its scope to cover individuals who may be responsible for the commission of international crimes. For they often hold an official position and their respective states provide them with a protection available under another, norm of international law; i.e. the rule of granting immunity attached to a public office.

The doctrine of immunity serves the double purpose of respecting the aforementioned state sovereign equality on the one hand and promoting diplomatic functions,² that form a device through which a state can act on the multinational level, on the other. The basis for the latter is derived from the principle *ne impediatur legatio* which requires ‘absolute immunity to safeguard the diplomat’s freedom from local interference’³ and its legal regulation is set out in the 1961 Vienna Convention on Diplomatic Relations (hereinafter the VCDR). All in all, it is of a functional necessity on the international arena that immunities are provided.⁴ These aims need to be well balanced with competing respective rules of international law, including international individual criminal responsibility in particular.

¹ See more, e.g. W. Czapliński, A. Wyrozumska *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2004, p. 131-475.

² M. A. Tunks *Diplomats or defendants? Defining the future of head-of-state immunity*, 52 D.L.J. 2002, p. 659.

³ H. Fox *The Law of State Immunity*, New York 2002, p. 510.

⁴ R. Cryer, H. Friman, D. Robinson, E. Wilmschurst *An Introduction to International Criminal Law and Procedure*, New York 2007, p. 426; the authors list many previously acceptable rationales for immunities as well. They are legal fictions such as extraterritoriality of the mission, personal representation of an ambassador to be equal to a head of state or personification of a state. Moreover, political expediency or respect for the dignity of the head of State used to be invoked. The authors however have noticed that none of the abovementioned underlying values gives a sufficient argument for the existence of immunity nowadays.

In general, three different models of immunity can be distinguished. The first is primarily attached to the state, the second one is diplomatic immunity confirmed in Article 31(1) of the VCDR and finally, the well-established Head of State immunity. Herein, the latter model is considered as one related to high state officials; a group that is still to be clarified.⁵ It is also an example of a visible balancing of the previously mentioned values promoted in international law.

There are two types of immunity (from Latin *immunitas* – exempt from service or obligation⁶) which have a profound meaning in the doctrine of law: functional and personal. They are inherent in the system of protection given to officials, depending on the stage of the performance of their duties. These types are basic for most kinds of immunity however they acquire a specific shape when applied to persons with a high official position in a hierarchical ladder of the machinery of a state. Many names have been given to them in order to emphasise their characteristics, i.e. immunity *ratione materiae* or substantive immunity for the former and immunity *ratione personae* or procedural immunity for the latter.

Those immunities' attributes are relatively clear and in majority agreed on by the doctrine of law. As a prominent feature of both the national and international system of law they have been described probably by all the literature available relating to the subject. Only a few aspects of these immunities are still questioned by scholars; i.e. their origin and usage and the scope of their application in the modern reality.

Immunity *ratione personae*. Personal immunity in its general shape raises less doubts than functional. This procedural defence, as Cassese has named it,⁷ protects senior state officials from prosecution by foreign states whilst they are exercising their public functions. Thus, it is in line with the previously mentioned doctrine of promotion of diplomatic activities of a state. In fact, this immunity is very similar to the one provided in the VCDR. It enables those covered to carry out official duties abroad without the threat of the powers of a foreign state apparatus hindering them.⁸ However, it differs as far as the range of states that may

⁵ See herein, Ch. I para. 1b.

⁶ 'Immunity' *Online Ethymology Dictionary*, see: <http://www.etymonline.com/index.php?term=immunity>, accessed on 17.08.2010.

⁷ A. Cassese *When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium case*, 13(4) E.J.I.L. 2002, p. 863-864.

⁸ P. Gaeta *Official Capacity and Immunities in The Rome Statute of the International Criminal Court – A Commentary* by A. Cassese, P. Gaeta and J. Jones (edit.), vol. 1, Oxford 2002, p. 976.

be affected by it is concerned. Whilst appointed diplomats are protected only by so-called *ius in transitus innoxii* (i.e. the exemption from prosecution is valid in the hosting state of destination of the foreign official while on an official visit and only on a foreign territory, as well as countries which he passes through on the way to his destination⁹), there seems to be an agreement amongst scholars nowadays that the head of state immunity is significantly broader and encompasses all states that may be affected. Thus, it is believed to be *erga omnes* and absolute, especially in relation to a possible foreign criminal jurisdiction.¹⁰ It must be noted that this immunity constitutes a bar from both criminal and civil jurisdiction however only the former is relevant for the purposes of this thesis. Personal immunity covers acts that are both official and private in their nature, as long as they are committed prior or during the exercise of the office. What stems from this is that the protection ends with the cessation of the office – when this happens a person who has previously been accorded immunity can be prosecuted for acts committed in their private capacity and, which will be evaluated later,¹¹ in official capacity as long as they meet certain requirements for the attribution of the act to be possible. Additionally, at this moment personal immunity ends and it somewhat transforms into functional immunity. This is not however the only situation enabling an official to be brought to court by a foreign state. Another possibility is that the immunity is waived by the home-state.¹² This may happen especially in the event of an arrest warrant against an invulnerable official issued by another state or an international tribunal when it seems to be implicitly required by the international community. However, this is not a legal obligation and the waiver remains within the sovereign powers of the home-state and the executive in particular. As Van Alebeek states, the government ought to be legitimate according to the internal law of the state concerned.¹³ It was not previously clear whether a head of state could waive his own immunity,¹⁴ however

⁹ A. Cassese describes this issue by enumerating situations in which such protection applies: ‘it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country’. See A. Cassese *When may...*, 2002, p. 864.

¹⁰ R. Van Alebeek *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, New York 2008, p. 169.

¹¹ See Ch. I (1c).

¹² It is also stated in both case law and literature that a withdrawal is another way of denying the immunity. However this is only true as far as diplomats are concerned as they are subject to a requirement for them to be recognised by the host-state there for diplomatic purposes. The host-state therefore can withdraw its consent and in this way the diplomat is deprived of his protection. Obviously no such decisions can be made towards high state officials; they cannot be determined a *persona non grata*. See more: N. Boister *Case comment: The ICJ in the Belgian Arrest Warrant case: arresting the development of international criminal law*, 7(2) J.C.&S.L. 2002, p. 299.

¹³ R. von Alebeek, *op. cit.*, p. 182.

¹⁴ W. Czapliński, A. Wyrozumska *op. cit.*, p. 250.

this as yet unprecedented event seems to be permitted now as long as the government of the home-state does not oppose it in the first place. Sometimes an explicit decision on that matter also needs to be taken.¹⁵ It is stated in the literature, also that, in the case of a collapse of a state, the immunity stops its functioning.¹⁶

Immunity *ratione materiae*. In case of a cessation of the office, immunity *ratione materiae* begins to have its *raison d'être*. Its construction is not as unquestionable however. Due to a plethora of problems surrounding its application in the field of international criminal law, a number of doctrinal theories have arisen in order to explain its origin, its relationship with individual responsibility for international crimes as well as its relation to other rules that should be balanced alongside it. These theories generally aim at defining its current status as more cases on the matter take place. The main characteristics are nevertheless relatively clear.

Some misunderstandings exist as to whether functional immunity comes into being when a person is first appointed to the official post or if protection starts only after a person leaves the office. In the first case both types of immunities overlap and co-exist and while immunity *ratione personae* eventually comes to an end, the functional one never stops protecting the person for acts once committed on behalf of the home-state.¹⁷ In the second case, which seems to be more logical, personal immunity is superseded by functional at the moment of cessation of the office. This would constitute a sensible situation, since a senior state representative is absolutely invulnerable while he holds his office (thus no functional protection is necessary) and the danger of being brought to justice for some official acts is shielded afterwards because of immunity *ratione materiae*. This is particularly apparent in the immunity of high state officials, for they enjoy both of them fully. Such a construction would not be applicable to persons who are not awarded with personal immunity to the same extent, e.g. consular officers.¹⁸ Only actions of an official nature of the latter are protected from foreign jurisdiction. This issue is however only of an academic value.

In general, all activities of an official nature and completed on behalf of the home-state with its recognition whilst performing public functions are covered by immunity *ratione materiae*. The type of public post is irrelevant in this case as the scope of persons awarded

¹⁵ R. von Alebeek, *op. cit.*, p. 181-182.

¹⁶ W. Czapliński, A. Wyrozumska, *op. cit.*, p. 250.

¹⁷ Such proposition is suggested *inter alia* by R. Van Alebeek, *op. cit.*, p. 114-115. Also: A. Cassese by stating that this substantive defence 'does not cease at the end of the discharge of official functions by the state agent'; *When may...*, p. 863.

¹⁸ D. Akande *International Law Immunities and the International Court*, 98 A.J.I.L. 2004, p. 409.

with functional immunity is very wide. It embraces heads of state, heads of government, lower ministers or other persons who may act as representatives of a state in certain situations but are not organs of a state (members of special missions, other delegated officials and so forth).¹⁹ Moreover, this immunity is of *erga omnes* effect; i.e. it does not matter where an action of a state official is taken – abroad or within his home-state territory. This substantive defence applies equally on an international and national level however certain variations may exist when it comes to answerability for the commission of international crimes.

Although the premises of functional immunity seem to be quite easy to understand, there are certain dilemmas broadly discussed in the literature. These mainly concern: the relation between state immunity and immunity *ratione materiae* of high state officials, the problem of defeating the presumption of the state's authority in order to establish individual criminal responsibility, issues of determining which acts should be deemed official and which private, and distinguishing an official from personal capacity of a state agent. To solve these dilemmas it is necessary to find a final answer to the question of whether high state officials can be held liable for committing crimes of international relevance and, if so, under what circumstances. It is of great importance since the case law appears to have confirmed a rule under customary international law that this substantive defence does not constitute a bar from prosecution of international crimes.

It is of common knowledge that functional immunity stems from immunity enjoyed by a state on the international arena. The rationale for this rule is that all states are equal in their sovereignty and thus there shall be no jurisdiction of one state over another. As Akande has put it:

‘(...) the immunity of state officials in foreign courts prevents circumvention of the immunity of the state through proceedings brought against those acting on behalf of the state. In this sense, this immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act.’²⁰

The Act of State doctrine is noticeable here. Under this theory, ‘acts committed as a mere arm or mouthpiece of a foreign state are acts of that state rather than acts of the officials

¹⁹ *Ibidem*, p. 412-413.

²⁰ *Ibidem*, p. 413.

personally'²¹. This is mainly the basis of immunity of a state. States as international legal entities have no other tool but to act through their officials. Therefore any conduct which relates to the state should be attributable to it rather than to the officer.²² There have been many attempts to transpose this theory on to the immunity of state officers. According to Van Alebeek, there is a legal rule of presumption of authority of the state. The rule – an assumption that a certain act is committed in the name of the home-state by its representatives – activates only when the states operate within the context of international law. The context exists if there has been a mutual agreement between the host and home-state as to the extent of official functions performed abroad.²³ Since states enjoy sovereign powers, within their internal and national law they can design the scope of acts considered as public and conducted on behalf of the authority. Abroad however these rules are subject to the requirements imposed by international law (codified and/or customary). This is why the distinction between official and private acts is important. Clearly, it is up to the state itself to define which actions shall be deemed official or, in other words, to determine for what conduct its officers avoid their personal responsibility. The liability then is taken over by the state and only the state can be brought to justice. Officers stay immune, since their home-state has in a way signed and permitted the conduct as its own. The vital question is whether this competence is boundless. Are the states free to cover also criminal conduct with the protective cloak of state authority? The dangers seem obvious: widening the scope of officials awarded with the same kind of immunity²⁴ would encompass the most hideous international crimes and mean invulnerability of the perpetrators and no threat of them ever being charged.

However, the recent evolution of international criminal law, such as the landmark Pinochet Case²⁵ (frequently cited in following case law), proves that states have agreed not to qualify criminal conduct of such kind as an act of state. Van Alebeek has evaluated this topic in her book *The Immunity of States and their Officials in the International Criminal Law and International Human Rights Law*. Even though her theory is novel and original, it seems convincing as it helps to solve problems which other scholars (like Cassese or Gaeta) have commented on, often by criticising the judgements of international courts and the reasoning of the judges.

²¹ R. Van Alebeek, *op. cit.*, p. 112.

²² See more on the Act of State Doctrine: W. Czapliński, A. Wyrozumska, *op. cit.*, p. 251-253.

²³ R. Van Alebeek, *op. cit.*, p. 116.

²⁴ See more on this subject: *Democratic Republic of Congo v. Belgium*, Arrest Warrant of 11 April 2000, Judgement, I.C.J. Reports 2002, 14.02.2002 (hereinafter the Yerodia Case), *Dissenting opinion of Judge Van den Wyngaert*, para. 21; N. Boister *Case Comment: The ICJ...*, p. 299; see also herein: Ch. I (1b).

²⁵ *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, 24.03.1999, [2000] 1 A.C.; hereinafter the Pinochet Case.

Van Alebeek's hypothesis is contrary to the traditional thinking suggested by Hans Kelsen; i.e. the assumption presented above that functional immunity comes from state immunity. This problem occurred in the Pinochet Case. The judges were trying to solve a tension between the nature of torture as a crime; i.e. requiring it to be perpetrated by a state official,²⁶ and the fact that for these acts state agents are immune thanks to the functional immunity. To avoid being on the horns of this dilemma, Van Alebeek distinguishes between 'ostensible authority' (one could say official acts *sensu largo*) and the state's authority in the proper sense (official acts *sensu stricto*).²⁷ While international crimes would be considered as official acts *sensu largo* for the purpose of establishing their necessary components, they would not constitute *sensu stricto* official acts, because a state agent would exceed the scope of his public functions and would be acting *ultra vires*. In the words of the scholar:

'(...) the concept of "ostensible authority" should be understood from the perspective of the exercise of state authority under international law. Moreover, the concept may be circumscribed by rules of international law. Not all acts that can be attributed to the state are hence official acts, and private acts are not merely "frolics of the individual's own".

'(...) It is therefore better to avoid the terminology altogether and to say that functional immunity applies when acts have been committed *as* state official instead of *in the capacity of* state official. Or even better, that the rule of functional immunity is not concerned with the capacity in which an act is committed but rather with the capacity in which an official may be sued.'²⁸

In an attempt to establish that the absence of immunity for official acts is inherent within the rule of the immunity itself, Van Alebeek claims that the presumption of the state's authority can be defeated by the home-state. It may happen *a posteriori* or, in other words, - *ad hoc*; i.e. a specific activity of a state agent is considered by the home-state as an excess of public authority and therefore no immunity is vested. The second option is a general defeat, so-called *a priori*. In this case, states in conformity agree on a general exemption that a certain type of action will never be authorised by any state.²⁹ The latter inevitably opens a vital opportunity in the law of international criminal responsibility. Since personal immunity ceases when the office is left and only functional immunity protects a former state

²⁶ See more herein: Ch. I (2b).

²⁷ R. Van Alebeek, *op. cit.*, p. 130-133.

²⁸ *Ibidem*, p. 133; emphasis original.

²⁹ *Ibidem*, p. 131.

agent at that stage, immunity *ratione materiae* may be overcome in this manner by an *a priori* general exemption created by the states in the field of customary international law.

As a conclusion, three possibilities of how international crimes may be treated (when it comes to determining whether they are official or private in their nature) are summarised. The first group states that the absence of immunity is intrinsic to the sole rationale of the rule of immunity – there is a general exemption created for the crimes and all of them are committed in the private capacity of a state agent.³⁰ The second group, subdivided into two parts, includes separate exceptions in spite of the rationale for the immunity.³¹ Firstly, it is an exception to the rule of attributability to the state of a crime perpetrated by an official; i.e. international crimes shall not be attributed to the state. Secondly, an exception to the individuals who commit crimes is created. As was put in the words of Gaeta: ‘all State officials, including those at the highest level, are not entitled to functional immunities in criminal proceedings – either of national or international nature – if charged with such offences as war crimes and crimes against humanity’. She understands this solution as a matter of *lex specialis derogate legi generali* rule.³² However, Van Alebeek remains unconvinced and disagrees with both statements and lists the reasons for why they fail when undergoing certain reasoning.³³ Her way of thinking appears credible and trustworthy. The international customary rule of immunity stays unaffected, whereas there is enough room for individual responsibility for international crimes to be established. Both of these norms are of the highest level of significance and therefore should not trump each other.³⁴ On that basis, it is necessary to either create separate space in which they can co-exist by defining their constructions in a novel way or to balance them by means of the policy of a state and turning them in that direction. The latter is suggested in the collective work of a number of authors:

‘(...) the law reflects a balancing. It is also clear that international priorities are shifting in favour of justice and accountability, and the balance in the law is tracking this with a corresponding evolution, with the scope of immunities becoming gradually narrower.’³⁵

³⁰ *Ibidem*, p. 239-241.

³¹ Of this opinion e.g. D. Akande *International Law Immunities...*, p. 414.

³² P. Gaeta *Official capacity...*, p. 982-983.

³³ See more, R. Van Alebeek, *op. cit.*, p. 239-241.

³⁴ Such explanation is sufficient for the purposes of this Chapter, however, as it will be argued later (see Ch. II (2)(b)), the rule of international law that grants immunity to high state officials is doubted to be on the same level of hierarchy of norms.

³⁵ R. Cryer *et al.*, *op. cit.*, p. 428.

According to this, immunity *ratione materiae* may be overridden by a rule that international crimes are not official in their nature and *ratione personae* is set aside by the creation of international tribunals.³⁶

All of the theories in general aim at finding a coherent argument for which functional immunity is irrelevant when an international crime is committed. The ingraining of this rule the case law available seems inevitable but not sufficient for scholars who keep looking for a proper explanation from an academic point of view. It has to be stressed nevertheless that these propositions are not true for personal immunity, which means that if a state agent is in office, he is still protected from foreign prosecution. This is a problem that will be evaluated later.

A summary of essential characteristics of personal and functional immunity can be found in the chart below.

Feature	Personal immunity / Procedural immunity / Ratione personae	Functional immunity / Substantive immunity / Ratione materiae
Common remarks	<ul style="list-style-type: none"> - Both inherent in the system of protection granted to the officials of a state. - Both depend on the stage of performing duties related to the official position. - The distinction applicable to all kinds of immunity. - Nowadays questioned: origin and usage as well as their application in the modern reality. 	
Type of defence	Procedural.	Substantive.
Person protected	Senior state officials from foreign states prosecution while exercising public functions.	Any public person acting in their official capacity (very wide scope of offices encompassed).
Underlying rationale	Doctrine of promotion of diplomatic activities of a state.	Equality and sovereignty of states (either from the state immunity or from a distinction of official acts <i>sensu largo</i> and <i>sensu stricto</i>).
Subjects applicable to	Applies <i>erga omnes</i> and is absolute.	Applies <i>erga omnes</i> .
Type of bar from jurisdiction	Civil and criminal.	Civil and criminal.
Capacity of acts covered	Official and private acts when committed prior or during the exercise of the office	Official acts, i.e. committed in the official capacity.
The end of protection	With cessation from the office.	Protection does not end automatically, immunity continues/ starts its existence after leaving the office.
Waiver	May be waived by the home-state; ceases in case of the	Through a rule of international law it does not apply to international

³⁶ On the stand of international tribunals to immunities see more herein: Ch. II (1a).

	collapse of the home-state; a possibility of self-waiver is discussed.	crimes.
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Source: the conclusions above.

b. The concept of high state officials

As was mentioned at the beginning, there are three major models of immunity according to their subject: state, diplomatic and head of state. Whereas the origin of the first two are obvious, it is not so simple to justify a separate form of immunity for heads of state. This protection seems to be in a way *secondary* when related to the primary pair of immunities. It is because, as Tunks has noticed, head of state immunity satisfies the aforementioned immunities' doctrines: sovereign and diplomatic, i.e. '(1) recognising an appropriate degree of respect for foreign leaders as symbol of their state's sovereign independence; and (2) ensuring that they are not inhibited in performing their diplomatic functions'.³⁷ This clearly indicates that two original theories have been combined here, so that a stronger position is given to the most important people in the state's apparatus. The two-sided nature of immunity of state agents may be examined from a different point of view. Here, the types of immunity, i.e. *ratione materiae* and *personae*, overlap in the discussed model – the former takes the characteristics of state immunity and the latter derives its crucial elements from protection of diplomats.³⁸ Therefore, it seems reasonable and necessary to distinguish this model of immunity, applicable to the key officers of a state who play such a significant role on the modern international arena. As this thesis focuses exclusively on the immunity of high state officials, it has to be noted that accordingly the remarks given may be of a *mutatis mutandis* value on the remaining, primary immunities.

An evaluation on the members of this notable group is required. Unfortunately a fixed enumeration of them is impossible, as no legal act exists on this topic in particular. It would be simple to list the members and staff of the diplomatic or consular mission, since it is provided in two Vienna Conventions (the 1961 VCDR and the 1963 Vienna Convention on Consular Relations). The only indication on the composition of high state officials may be found in individual articles of some legal acts, such as the International Criminal Court Statute (the ICC Statute or the Rome Statute)³⁹ and the Statutes of *ad hoc* Tribunals

³⁷ M. A. Tunks, *op. cit.*, p. 654.

³⁸ W. Czaplinski, A. Wyzozumska, *op. cit.*, p. 247. More on the similarities and differences between diplomatic and State immunity see: H. Fox *The Law...*, p. 453-460.

³⁹ Art. 27 of the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, 37 ILM 1002 (1998), 2187 UNTS 90.

respectively⁴⁰ or the 2001 Resolution on ‘The Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law’⁴¹. Case law on this matter is, to put it bluntly, rather scarce. The courts are hesitant to get involved into a discussion about it and prefer to limit their deliberations to the problem at issue. Thus, in such a situation, the best solution seems to be the enumeration of typical features of these officials rather than naming them. The most significant is that these officers are awarded immunity by their home-states; although it may appear an *idem per idem* definition, however given that this competence stays within the sovereign powers of the states it is justified. Another requirement is having the capacity to act as a state representative, i.e. being empowered by the state to act on its behalf. State representatives in the meaning of the United Nations (hereinafter the UN) Convention on Jurisdictional Immunities of States and their Property,⁴² according to the ILC Commentary⁴³, include: ‘(...) all natural persons who are authorised to represent the state in all its manifestations’. Again it is upon the national laws to decide which posts shall have this authority.⁴⁴ The aforementioned Commentary lists as follows: sovereigns, heads of states, heads of government, heads of ministerial departments; ambassadors, heads of mission, diplomatic agents and consular officers – the latter however shall enjoy immunity in a different capacity than high state officials for the purposes of their immunity function.

⁴⁰ Art. 7(2) of the *Statute of the International Tribunal for the Former Yugoslavia* (hereinafter the ICTY Statute), UN Security Council Resolution 827 (1993), S/RES/827 (1993), 25.05.1993; and Art. 6(2) of the *Statute of the International Tribunal for Rwanda* (hereinafter the ICTR Statute), UN Security Council Resolution 955 (1994), S/RES/955 (1994), 8.11.1994.

⁴¹ The Institute of International Law *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, 26 August 2001, see: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF, accessed on 24.05.2011. This is a document prepared by the International Law Commission, established by the UN General Assembly. Although it is not binding on the states, its drafts play an important role in the formation of new rules of international law – both of conventional and customary nature. Moreover, it evinces the general practice of the international community as a whole. See more: M. N. Shaw *International Law*, 5th ed., Cambridge 2003, p. 112-114.

⁴² UN General Assembly *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38.

⁴³ *Report of the Commission to the General Assembly on the Work of its Forty-third Session*, II-2 YILC 18, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), 1991.

⁴⁴ As R. Van Alebeek points out, states’ competence to delegate its authority on chosen persons is not unlimited: ‘(...) unless the international law element comes into play – the rule that only the home state may determine the scope of an official’s authority finds its limit in territorial boundaries. Authority to exercise sovereign activity in the territory of a foreign state is by definition dependent on the consent of the foreign territorial state. Outside the territory where the home state exercises exclusive competence, the authority of a state official that performs sovereign activity is also defined by the agreement between the sending and receiving state on the scope of his functions.’ This is with regard to her theory of acting under ostensible authority of a state and its relation to the application of this rule to functional immunity. See more: *op. cit.*, p. 116-117.

Even if the group of high state officials looks very flexible and undefined as it has been proven above, some scholars have attempted to clarify the problem. The least questioned are heads of state. No matter what their titles are, depending on the kind of political system, they are awarded the highest level of protection. Additionally, the scope of authority given to the head of state is not important – the level of protection awarded to a king enjoying no more than representative functions is equal to the case of a president holding a relatively strong executive position.⁴⁵ The only condition is that in the meaning of public international law it has to be a sovereign state.⁴⁶

The second group that may be potentially considered are the family members of a head of state. This might be justified by reference to diplomatic standards, in which the closest family as well as private servants are treated accordingly. Such an extensive model of invulnerability is provided in the UK 1978 State Immunity Act⁴⁷ (hereinafter SIA). It has to be noted that such an attitude, as prescribed in the national law, among modern countries is rather rare, not to say obsolete. More commonly, perhaps save for the spouse of the head of state, immunity of the relatives is ‘a matter of international comity rather than of established international law’.⁴⁸ It is also agreed that when on a special mission, family members are indeed protected, however in the capacity of this mission; the immunity is then rather diplomatic than the one awarded to a head of state.⁴⁹

Heads of government and ministers of foreign affairs (and allegedly of other similar departments) is the last group generally awarded with immunity. The previously mentioned legal documents generally encompass it – for instance, by including a provision ordering the application of the same provisions as to head of states accordingly⁵⁰ or just by simple enumeration⁵¹. Although some authors have found it unconvincing, such as Van Alebeek,⁵²

⁴⁵ R. Van Alebeek, *op. cit.*, p. 182.

⁴⁶ *Ibidem*.

⁴⁷ Parliament of England, 1978 State Immunity Act, Chapter 33, 20.07.1978.

See: <http://www.legislation.gov.uk/ukpga/1978/33/contents>, accessed on 24.05.2011. Section 20.1 of SIA provides: ‘(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to (a) a sovereign or other head of State; (b) members of his family forming part of his household; and (c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.’ (Emphasis added).

⁴⁸ R. Van Alebeek, *op. cit.*, p. 186.

⁴⁹ *Ibidem*; an official visit abroad as the company of the head of state is given as an example.

⁵⁰ See the 3rd part of the ILC *Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law*.

⁵¹ See *supra* footnotes no. 39 & 40.

case law on that matter (e.g. the Yerodia Case – of a minister of foreign affairs) has proved immunity to stretch over them. Another scholar remarks upon a growing need for spreading the scope of immunity *ratione personae* upon offices of even lower importance, such as representatives at international organisations or of international organisations. However, he notices, that these persons will usually be granted immunity by means of a treaty and only to a limited extent; e.g. only in that particular organisation or just when exercising a specific mission. This protection is certainly not of a customary status and is not internationally recognised.⁵³ It may be a little problematic to equalise ministers with heads of state, however the fact that when considered in the court these persons are generally agreed to have been acting under the same protective cloak of the state seems to justify such an opinion.⁵⁴

Lastly, a comment should be made on *de facto* state agents; i.e. contrary to *de iure* officers, legitimately exercising their functions. Case law radically diverges in this case even though cases dealing with this are mainly under consideration of national courts. In the 1990 Noriega Case, invoked by Czapliński and Wyrozumska, the court did not recognise the immunity of the President of Panama, who was not chosen in the general elections; whereas in 2001 the French Cour de Cassation did not even attempt to deliberate the legitimacy of Qaddafi's election and simply awarded him personal immunity.⁵⁵ However, an opportunity of denying immunity to an illegitimate officer is acceptable, since 'non-recognition of a particular regime (...) is still feasible'.⁵⁶ Therefore, should *de facto* officers be treated as any other person capable of committing an international crime, there is no problem of them being protected by the state and their individual criminal responsibility under international

⁵² See more R. Van Alebeek, *op. cit.*, p. 186-195; stating that immunity applies only when on an official visit, thus private journeys are excluded, unlike in the case of heads of state.

⁵³ D. Akande *International Law Immunities...*, p. 412.

⁵⁴ Other officers may be immune from foreign jurisdiction as a matter of international comity and custom, rather than of a legal obligation. States are free to award special protection to anyone they find it necessary, however a reasonable consideration must be given to the international rules on individual criminal responsibility as such immunities must not hinder prosecution of international crimes. Moreover, different types of immunity can be enjoyed by state officials under their home-state national law. See more: P. Gaeta, *Official Capacity...*, p. 977-978.

⁵⁵ W. Czapliński, A. Wyrozumska, *op. cit.*, p. 249. Arrêt of the Cour de Cassation, 13 March 2001, No. 1414, hereinafter the Qaddafi Case. Another case concerning Qaddafi occurred more recently in front of the ICC. Following the revolution and military operations in Libya, the UN Security Council adopted Resolution 1970 (2011) on the 26 February 2011. In this instrument the situation in Libyan Arab Jamahiriya was referred to the Prosecutor of the ICC. On the 16 May 2011, the Prosecutor, according to Art. 58 of the ICC Statute, applied to the Trial Chamber to issue an arrest warrant for Qaddafi, together with two other persons. In his statement he asserted that the system in Libya 'confers on Gaddafi absolute power and authority'. By these words it is affirmed that *de facto* heads of states might be taken into consideration as high state officials for the purposes of international criminal law. See: UN SC Resolution 1970 (2011), S/RES/1970 (2011), 26.02.2011 and *Situation in the Libyan Arab Jamahiriya. Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI*, Pre-Trial Chamber I, case no. ICC-01/11, 16.05.2011.

⁵⁶ R. Van Alebeek, *op. cit.*, p. 182-183.

law is highly possible. 'Foreign state officials not acting within the exercise of sovereign authority under international law incur personal responsibility for the commission of [international] crimes *even if committed under government orders*.'⁵⁷

c. Incumbent and former high state officials

The division of high state officials into incumbent and former is of essential importance for the establishment of their individual responsibility. Not only it is a distinction showing the nature of the application of the two types of immunity as was described in detail above but also it is of major significance for their personal responsibility for certain actions made in their official capacity. As it will be seen, there is a different reasoning for both of these groups as for the application of the rule of irrelevance of official position for the purposes of personal liability for international crimes. In the historical evolution of international criminal law there may be three stages distinguished, each of them marked by significant case law.

The need to bring international perpetrators to justice struck particularly after the Second World War, following a failure to establish proper rules in 1919. Until then the doctrine of criminal responsibility of senior state officials for such crimes of international law such as war crimes and crimes against humanity, was – least to say – non-existent and did not have any basis in customary international law. It was nevertheless clear that some sort of such principle was necessary to stop serious violations of law committed by high state or military officials during the war. These persons enjoyed full protection from foreign jurisdiction, as traditionally only low-level members of the armed forces could be denied immunity on the condition that war crimes were committed during time of war.⁵⁸ Thus, it was Article 7 of the 1945 London Agreement which provided for the removal of invulnerability of high state officials by stating that 'The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'⁵⁹ It was indeed the gravity of the crimes, supported by the need to protect human rights – slowly emerging as a symbol of modern international law – that was crucial for such a breakthrough to be achievable. Having established the rule of individual criminal responsibility, a series of milestone cases followed

⁵⁷ *Ibidem*, p. 125. More on the problem of superior orders responsibility, see: A. Cassese *International Criminal Law*, New York 2008, p. 268-280.

⁵⁸ P. Gaeta *Official Capacity...*, p. 979.

⁵⁹ *Ibidem*, p. 981.

to create the final rule of irrelevance of official capacity for international crimes; i.e. the Pinochet Case, the Yerodia Case and the Bashir Case.

Former high state officials. The first step in the construction of the rule of irrelevance of official capacity was to remove the immunity of former state agents. This happened in the Pinochet Case, although neither unanimously nor without deep deliberations. The saga (as it consisted of three hearings: one before the Divisional Court and two in front of the Appeal Chamber) started in 1998 when Augusto Pinochet, the former Chilean President was arrested in the United Kingdom on the basis of an international arrest warrant issued by Spain. There were numerous charges listed in the warrant, *inter alia* torture and other violations of human rights. The document alleged he had committed the crimes while he was a serving head of state, abusing his powers. Therefore, in his defence he claimed functional immunity derived from the 1978 SIA and on this ground demanded the warrant to be quashed by the court. Although judges in the first instance agreed that he was protected by the immunity as a former head of state, the House of Lords was of a contrary opinion in both of its hearings.⁶⁰ The Lords held by the majority of six out of seven that even though (as a former head of state) he was entitled to functional immunity for acts committed in that capacity, torture is to be regarded as an international crime for which such protection is not available as it cannot be considered as one of the official functions exercised by a state agent. The judges had to deliberate on various points of the judgement: *inter alia* the nature of the prohibition of torture, the universal jurisdiction for the crimes such as torture, the problem of double criminality for the purposes of extradition, the grounds of withdrawing immunity and finally the basis for English jurisdiction in this case. The crime of torture is proscribed by the 1984 UN International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Torture Convention),⁶¹ which was ratified by the UK in 1988. This final date is crucial, as in the opinion of the Lords (by the majority of 6, with Lord Millet dissenting), it constituted the moment from which Pinochet could have been extradited to Spain. At the same time, by means of such a conclusion, many charges from the arrest warrant were inapplicable in front of a British Court, as some alleged

⁶⁰ There were two appeal cases in the Pinochet Case: the decision of the first one was challenged on the grounds that the Appellate Committee was improperly constituted. Before the case was reheard by a changed committee, Spain 'had particularised further charges against the applicant' (such as conspiracy to murder and attempted murder), significantly expanding the alleged list of crimes for which Pinochet should be extradited. The Pinochet Case, p. 147.

⁶¹ UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 1465 U.N.T.S. 85, 10.12.1984; see: <http://www2.ohchr.org/english/law/cat.htm>, accessed on 25.08.2010

crimes had taken place before 1988 and, as the Lords agreed, English courts had no jurisdiction. Therefore, extradition was only possible ‘for offences of torture or conspiracy to torture which were said to have occurred after 8 December 1988’.⁶² The biggest issue was whether torture should be treated as a private or an official act. It stems from the elements of this offence, among which holding an official position can be found.⁶³ The Lords attempted to solve this by various means, eventually coming to the conclusion that the actions of Pinochet were indeed immune for official acts committed when in office, however international crimes are not official acts for the purposes of the application of immunity. In the words of the judgement, since there was universal jurisdiction established for torture:

‘the state parties could not have intended that an immunity for ex-heads of state for official acts of torture (...) would survive their ratification of the Convention’.⁶⁴

This intricate construction is somewhat confusing. In general, immunity was found to be inconsistent with the purpose of the Torture Convention, although its wording indicates the necessity of holding an official position. At the same time, holding an official position is not the same as exercising official functions; hence, torture stays outside the scope of competence given to the President of Chile (such actions cannot be considered as made under the protective cloak of the state because they amount to international crimes) – so it is not an official act, but Pinochet was at that time holding an official position. All the requirements are met and immunity can be lifted. Another convincing solution to the problem could be the theory suggested by Van Alebeek as evaluated above⁶⁵. Nonetheless, the Pinochet Case constituted a landmark case that ‘sounded the death knell for head-of-state immunity for international crimes with respect to *former* head of state, even when the crimes were perpetrated while the leader was in office.’⁶⁶

Incumbent high state officials. Having established irrelevance of the official capacity of former high state officials on the basis of the Pinochet saga in the House of Lords, other intriguing cases have arisen up on the subject of incumbent state agents. This might have been anticipated as ‘even current heads of state who commit international crimes and rely upon sovereign immunity while in office may eventually lose office and immunity’ and so a sort

⁶² The Pinochet Case, p. 149.

⁶³ Art. 1 of the Convention reads: ‘when (...) inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’ (emphasis added).

⁶⁴ The Pinochet Case, p. 148; emphasis added.

⁶⁵ See herein Ch. I (1a).

⁶⁶ M. A. Tunks, *op. cit.*, p. 659.

of caveat had been made for them by the precedent Pinochet Case.⁶⁷ From them one can doubtless see that there is much more apprehension about allowing them to be held under the jurisdiction of the courts and denied the protection. The Yerodia Case⁶⁸, heard by the International Court of Justice (hereinafter the ICJ), was instigated by a Belgian international arrest warrant issued *in absentia* against a sitting minister of foreign affairs of the Democratic Republic of Congo, Abdulaye Yerodia Ndombasi. The Congo, apparently threatened by such behaviour of the Belgian authorities – referred the case to the ICJ stating that Belgium did not respect Yerodia’s personal immunity. The judgement was broadly criticised by the scholars on a plethora of accounts; i.e. the lack of consideration of the jurisdiction (especially universal), the little or in fact complete lack of argumentation for equalling (and equalling itself) the position of a minister of foreign affairs with those of higher officials, failure to distinguish personal from functional immunity and the fact that not enough value was given to the rule of international criminal responsibility. Disapproved but meaningful in the letter of law – the ICJ’s decision was the first case in which an assessment of the immunity of an incumbent high state official was necessary. The court, after rejecting the Belgian objections with regards to the Court’s jurisdiction, mootness and admissibility, held by the majority of thirteen votes to three in paragraph 78(2) of the judgement that the issuance of the warrant by Belgium ‘constituted of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law’. In this simple statement the Court generally omitted the rule of individual criminal responsibility, needless to say of how high significance in international criminal law; and elevated the position of the foreign minister up to the importance of head of state. The ICJ devoted only one paragraph of its judgement for considerations related to the nature of functions exercised by the minister of foreign affairs, i.e. para. 53. It concluded that ‘throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability’ and that ‘no distinction can be drawn between the acts performed by a Minister of Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity”, or (...) between acts performed before the person concerned assumed office (...) and acts

⁶⁷ N. Boister, R. Burchill *The Pinochet precedent: don’t leave home without it*, 10(4) C.L.F. 1999, p. 442.

⁶⁸ The crimes alleged are: grave breaches of the 1949 Geneva Conventions and of the Additional Protocols thereto and crimes against humanity.

committed during the period of office'.⁶⁹ By such a simplification the Court avoided any need for reflection of the fact that the alleged crimes perpetrated by Yerodia happened before the assumption of the post by the accused. In a way losing its chance to establish a proper precedent in the law, the ICJ admitted that it was unable to infer from the states' practice that there exists an exception to the rule of immunity within customary international law, which would allow sitting high state officers to be brought to justice if charged with alleged commission of war crimes or crimes against humanity.⁷⁰ As Cassese notices, it is possible that the Court did not mean to state that there is not any such rule and that by not taking any stand on this matter it simply intended to suggest that the mere existence of it does not remove immunity for state agents in office.⁷¹ Irrespective of the criticism on many points, the ICJ decided to pronounce four occasions when immunity would not constitute a bar from jurisdiction, which may be seen as a way of justification of its findings. These are namely: firstly, a trial is allowed in the home-state as no international immunity is vested there; secondly, immunity may be waived by the home-state; thirdly, no immunity *ratione personae* is available after cessation from the office; and fourthly, an international criminal court may exercise its jurisdiction when applicable over immune persons.⁷² These situations are in line with national state practice; however, as Boister points out, they proved to be ineffective in this particular case and so Yerodia acted with impunity:

'He has not been subject to prosecution at home, his immunity has not been waived, it is unlikely that Belgium or another state will bother him after this judgement even though he has left office, and there is no international tribunal with jurisdiction.'⁷³

Even though the ICJ's decision seems to be imperfect from various points of view (which was rendered in separate or dissenting opinions to the judgement by all the judges as well), it may also be seen as an eye-opener for future problems. Cassese suggests quite a brave proposition in his article commenting on this case, arguing that the rule of irrelevance of official capacity can be extended to cover both former and incumbent state officials.⁷⁴

What is definite and clear is that, by the fourth option of exercising jurisdiction over sitting high state officials, the ICJ gave an open possibility to judge them by the international

⁶⁹ The Yerodia Case, para. 54-55.

⁷⁰ *Ibidem*, para. 58.

⁷¹ A. Cassese *When may...*, p. 865.

⁷² Judgement of the Yerodia Case, para. 61.

⁷³ N. Boister *Case Comment: The ICJ...*, p. 302. In fact, Yerodia is at the moment still a high state official in the current government of the Congo.

⁷⁴ A. Cassese *When May...*, p. 865.

courts established especially for the sake of bringing justice over perpetration of international crimes. The first indictment against a sitting head of state took place in 1999 and it was issued by the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY) against Slobodan Milošević. His trial, however, was never completed as he died in the Hague of a heart attack.⁷⁵ Especially creation of the ICC allowed giving rise to such cases. This has already taken place in a breakthrough case of President Al-Bashir. Bashir is a Sudanese official against whom an international arrest warrant was issued in 2009 by the ICC, after the Prosecutor accused him of crimes against humanity, war crimes and genocide⁷⁶, which he allegedly committed at time when he was in office. Such an action from the ICC has been widely commented on by the scholars, international organisations and a response to it has been given from various members of the international community. There were voices of approval and of strong opposition. What has to be noted is that the situation in Sudan was referred to the ICC by the UN Security Council – this may be some sort of facilitation but at the same time it has created a large discussion regarding international obligations of the state. As this situation has not yet been decided upon by the Court it is difficult to foresee what the final scene will look like. For now, the arrest warrants have not been executed by any of the states.⁷⁷ The Bashir Case is evaluated in detail below.⁷⁸

This is unambiguously evidence that there is a certain movement in international law towards a broader evolvement of irrelevance of official capacity rule. In fact, there seem to be two paths which are taken by the states when a situation like this comes into being. These are (1) when states act in the field of international law and are not bound by any international instrument (such as a convention or other types of interstate agreement), through which they have transferred some of their sovereign jurisdictional powers – the situation presented in the ICJ Yerodia judgement occurs; and (2) when states are bound by a treaty by which they have delegated the jurisdictional powers over their nationals (such as a membership in the ICC or being a member of the UN) – then the binding nature of these documents obliges them to give no relevance to the immunity of high state agents.

2. Objective scope of immunity in international criminal law

⁷⁵ R. Cryer *et al.*, *op. cit.*, p. 439. More on the Milošević Case see Ch. II.

⁷⁶ The Court found there was not sufficient evidence for genocide to be proved; recently however, this is to be reconsidered by the Pre-Trial Chamber on new grounds.

⁷⁷ See more on the problem of interstate cooperation and obligations related to the ICC Statute and the issue of immunities in international criminal courts: herein Ch. II&III.

⁷⁸ See herein Ch. II (1b).

a. Reasoning underlying the types of international crimes in relation to their imputability to high state officials

Having established the subjective scope of immunity, it is necessary to define the range of international crimes which may be committed by high state officials; i.e. its objective scope. What may be easily noted from the proposed methods of justification is that they altogether encompass all kinds of international crimes and aim at the removal of the possibility of invoking immunities for the purposes of the individual criminal responsibility regime. However, when characterised separately they include only certain crimes.

A profound distinction for this matter is the one suggested by De Sena,⁷⁹ by which he seems to expose the relation of a crime to the fact of holding an official position. In this division the role of international state responsibility is crucial. For this reason it is also valid herein – state responsibility understood as a sort of state involvement into the crime, through assessment of which the contribution of high state officials may be attained. According to De Sena, there are two groups of international crimes: (1) crimes which may be committed even when state responsibility is not asserted, i.e. are irrelevant; and (2) crimes that among their elements require a broader context, which are constituted by such imputability.⁸⁰ The crime of torture⁸¹ or enforced disappearance can qualify as examples of the first group. It is not inevitable to establish state responsibility in order to definitively declare this crime to have been committed. Adversely, a different crucial element in their definition is exposed: holding an official position. Genocide, crimes against humanity or war crimes – on the other hand – are examples of the second group. It should be noted, that the ‘context’ in question is constituted mainly when a state is directly or indirectly involved with the commission of the crime. In other words, there is a broader political situation which forms a background for a certain unlawful deed. Both groups seem to be of relevance for the matter of the immunity of high state officials as they indicate which crimes require some involvement of an ‘official element’. It does not mean however that no other international crimes may be committed by a representative of the state – one may think of a third group consisting of those not related in any way to the state. Perhaps piracy or terrorism could represent it.

⁷⁹ P. De Sena *Diritto internazionale e immunità funzionale degli organi statali*, 1996; as referenced by R. Van Alebeek, *op. cit.*, p. 431. De Sena’s distinction was initially designed for the use of explaining the distinction between functional and personal immunities, however is also helpful for the study presented herein.

⁸⁰ *Ibidem*, p. 140.

⁸¹ For specific characterisation of each of the crimes see Ch. I (2b).

In that case the perpetrator does not have to be an official, although such a possibility should not be excluded.

De Sena's distinction is of importance also for another, practical reason. He noticed that when it comes to prosecution of a wrongful act, national courts are more hesitant to adjudicate when asserting the context is necessary. In contrast, courts are more likely to start proceedings when the first group of crimes is concerned.⁸² Obviously this is not directly connected to the problem of proceedings in front of the international courts, however it may implicitly influence the states when enforcing a request for cooperation issued by them.⁸³ From another point of view, a small number of context-crimes were nevertheless prosecuted, which exposes the fact that the international community has instigated such a possibility by creating adequate legal means.⁸⁴ Taking the above into account, De Sena's distinction is of real importance and has developed some practical consequences.

The second type of justification created by the scholars is one based on the term of *ius cogens* norms.⁸⁵ Peremptory norms, because of their compelling character cannot be set aside by a different norm of a lower importance. It is unclear which of the norms in international law have been endowed with the status of *ius cogens*, but once it has happened there must not be any norm that stands in opposition to them. Therefore, if a prohibition of a certain deed is considered a peremptory norm, nothing shall hinder its abidance or constitute a bar to its prosecution. This is why the question of immunity creates problems, which however seem to be easily solved:

‘International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.’⁸⁶

Since there appears to be an inherent conflict in the rule itself (although according to Lord Millett's reasoning above there is no conflict and no immunity applies), one could say that all offences which have statuses confirmed as peremptory may be committed by high state officials and their immunity would never protect them in these cases. These arguments have been created by some scholars to encompass a broader scope of crimes as those than can

⁸² P. De Sena, *op. cit.*; as referenced by R. Van Alebeek, *op. cit.*, p. 141.

⁸³ Problems of cooperation will be discussed further herein, see Ch. III.

⁸⁴ P. De Sena, *op. cit.*, as referenced by R. Van Alebeek, *op. cit.*, p. 141. The author lists the cases (among them for instance Eichmann and Karadžić) and points out the creation of the Nuremberg Tribunal or the ICTY as the action undertaken by the community.

⁸⁵ Because this issue is further discussed herein (see Ch. II(2)(b)), the aspects evaluated at this point are limited only to a necessary extent.

⁸⁶ Lord Millett in the Pinochet Case, p. 278.

be perpetrated by a high state official. *Sensu largo*, they would include all so-called core crimes (because of their high status in the hierarchy of international rules). *Sensu stricto*, and there is a similarity to the first group of crimes proposed by De Sena, they could consist of either only the offences requiring an official involvement or all core crimes again, as official actors are frequently engaged in their commission.⁸⁷ The final justification for encompassing all core crimes cannot be fully supported because it looks into the factual features of a crime instead of paying attention to the legal aspects of their definition. However the *ius cogens* justification itself is convincing and based on strong arguments, which by reaching to the main features (i.e. the hierarchy of legal norms) of the system of international law has its consequences in practice.

b. Individual characteristics of international crimes related to an official element

This section presents those aspects of international crimes which are in some way connected to an official element. The element may be for example the governmental participation in or knowledge of the deed itself; the need for the crime to be perpetrated by someone holding an official position; or a broader political context in which the offence happens. It should be noted that there are some international crimes which seem to have no connection of the kind mentioned above.

International crimes may be generally divided into two categories: core crimes⁸⁸ and other crimes. Among the former – war crimes, crimes against humanity, genocide and the crime of aggression is enumerated and they are listed by the Rome Statute as those over which the ICC has jurisdiction. Torture and terrorism may be qualified as examples of the latter group.

Crimes against humanity. To start with crimes against humanity, provided in Art. 7 of the ICC Statute and Art. 5 and 3 of the ICTY and International Criminal Tribunal for Rwanda (hereinafter the ICTR) Statute respectively, a quick summary of the definition is necessary. There are several acts enumerated in the Statutes which shall be considered as prohibited for the purposes of this crime (eleven in the ICC Statute and nine in the Statutes of the *ad hoc* tribunals). However the essence of this core crime lies in the second

⁸⁷ R. Cryer *et al.*, *op. cit.*, p. 431.

⁸⁸ Core crimes are defined by the ICC Statute in Article 5 as ‘the most serious crimes of concern to the international community as a whole’.

requirement, i.e. that these acts are ‘committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’⁸⁹. This means that it is one of the context-crimes. The context is established according to the Elements of Crimes – a document adopted on the basis of Art. 9 of the ICC Statute, which states that the attack must be ‘pursuant to or in furtherance of a State or organisational policy to commit such attack’.⁹⁰ An explanation of the term ‘policy’ is inevitable as well and is defined as a requirement that ‘the State or organisation actively promote or encourage such an attack against a civilian population’.⁹¹ Crimes against humanity, blatant as such in infringing human dignity, are not therefore single acts but are perpetrated multiple times and ‘form part of a governmental policy or are tolerated, condoned, or acquiesced in by a government or a de facto authority’⁹². It must be noted that the background of the deed is very political and constitutes a strong element related to holding an official position. The scholars agree that crimes against humanity can be committed by high state officials or someone of a lower importance in the hierarchy, however acting in an official capacity.⁹³ Even when a private person acts in the abovementioned situation, the commission of a crime against humanity will be established only when this person is acting on behalf of the officials or is authorised by them. The strength of the link to the official capacity does not matter – it suffices when it is weak or implicit.⁹⁴ Explicitly this nexus is evaluated in a particular kind of crimes against humanity, i.e. enforced disappearance of persons. Art. 7 (2)(i) of the ICC Statute stresses the fact that the offence is done ‘by, or with the authorisation, support or acquiescence of, a State or a political organisation (...)’. The example of this crime is frequently considered as one of the main instances where the perpetrator must act in official capacity.⁹⁵

War crimes. Another one of the core crimes are war crimes, as provided for in Art. 8 of the ICC Statute, Art. 2 and 3 of the ICTY Statute and Art. 4 of the ICTR Statute. Being ‘serious violations of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflict’,⁹⁶ they are also examples of context-crimes, at a different

⁸⁹ Art. 7 (1) of the ICC Statute; emphasis added.

⁹⁰ *Elements of Crimes*, Assembly of the State Parties, ICC-ASP/1/3, Article 7, Introduction and Art. 7 (2)(a) of the ICC Statute.

⁹¹ *Elements of Crimes*, *op. cit.*

⁹² A. Cassese, *International...*, p. 98.

⁹³ *Ibidem*, p. 116.

⁹⁴ *Ibidem*.

⁹⁵ R. Cryer *et al.*, *ibidem*.

⁹⁶ A. Cassese, *International...*, p. 81. War crimes are in the ICTY Statute described in two ways – as grave breaches of the Geneva Conventions of 1949 and as violations of the laws or customs of war (Art. 2 & 3).

level however. The elements of war crimes are: existence of protected persons as well as an armed conflict and two kinds of interrelated connections, i.e. between the offence and the conflict and between the offender and the conflict. In order to understand the underlying nexus to the state, a definition of an armed conflict is useful. As was outlined in Tadić:

‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’⁹⁷

This quotation clarifies where in the definition of war crimes exists the official element. The conflict constitutes a broader context where state responsibility has to be asserted – following De Sena’s distinction. Although there is a possibility when no such nexus is necessary, war crimes may be considered as those which can be committed by an official. Cassese however stresses the fact that they are mainly perpetrated by military personnel,⁹⁸ nevertheless the possibility cannot be excluded.

Genocide. Genocide, regulated both by the means of the 1951 Convention of the Prevention and Punishment of the Crime of Genocide⁹⁹ and by its prohibition in the Statutes of the international tribunals¹⁰⁰, is a crime of which there is no doubt as to its *ius cogens* nature. The Convention reflects customary international law and therefore plays an important role in the way genocide is regulated. This legal instrument has in fact led to creation of a dual regime of responsibility for the commission of the crime. Its conditions were set out by the ICJ in the 2007 Bosnia and Herzegovina v. Serbia and Montenegro Case¹⁰¹ by stating that both state and individual responsibility may arise when genocide is considered.¹⁰² The state can be held responsible for not preventing the crime and for the individual criminal responsibility to arise *dolus specialis* is required.¹⁰³ Despite the peremptory character of the norm prohibiting genocide and regardless of the dual regime of responsibility, this crime does not include the contextual element in its definition. However, according to Cassese,

⁹⁷ *Prosecutor v. Dusko Tadić a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber of the ICTY, case no. IT-94-1-AR72, 2.10.1995, para. 70; emphasis added.

⁹⁸ A. Cassese, *International...*, p. 82.

⁹⁹ *UN Convention of the Prevention and Punishment of the Crime of Genocide*, Paris, 78 U.N.T.S. 277, 12.01.1951.

¹⁰⁰ Art. 6 of the ICC Statute, Art. 4 of the ICTY Statute, Art. 2 of the ICTR Statute.

¹⁰¹ *Bosnia and Herzegovina v. Serbia and Montenegro, Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgement of the ICJ, 26.02.2007, see: <http://www.icj-cij.org/docket/files/91/13685.pdf>, accessed on 23.08.2010.

¹⁰² A. Cassese, *International...*, p. 129.

¹⁰³ *Ibidem*, p. 129 and 137.

in practice there exists a tendency that certain categories of genocide are ‘a part of a pattern of conduct tolerated, approved, or condoned by governmental authorities’.¹⁰⁴ These crimes do not specify the context as one of their necessary ingredients, whereas some kinds of genocide¹⁰⁵ in a way presuppose such a requirement, even though it is not legally provided for. Additionally, it is not limited only to persons holding an official position to commit this offence. From above one can draw a conclusion that notwithstanding the definition of genocide and the lack of official elements in it, this crime is somehow related to the state by the fact that it can be brought to justice by its actions. This link however is rather weak in comparison to other core crimes as the responsibility can be assessed separately.

Crime of aggression. The Crime of aggression until recently had never been codified, although its prohibition was assumed by Article 5 (2) of the Statute. It has been a subject of deliberations of the 13th plenary meeting of the State-Parties to the ICC Statute, which on the 11th of June 2010 adopted a resolution¹⁰⁶ defining aggression and setting forth the conditions for exercising jurisdiction of the Court over this crime. The Resolution RC/Res.6 – despite yet lacking a binding character as it has not entered into force – deals with the crime with particularity. The definition given is detailed and seems to be meticulously designed to satisfy all State-Parties. The resolution adds Article 8 *bis* to the ICC Statute which reads:

‘For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’¹⁰⁷

The emphasised part as well as the Amendments to Elements of Crimes introduced by Annex II of the Resolution¹⁰⁸ makes it clear that only a person possessing a real competence to influence the actions of a state (i.e. holding an official position) or merely having a factual

¹⁰⁴ *Ibidem*, p. 141.

¹⁰⁵ These are namely: deliberately inflicting on a protected group or members thereof conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within a protected group; forcibly transferring children of a protected group to another group. *Ibidem*.

¹⁰⁶ The Review Conference *Resolution RC/Res.6, The Crime of Aggression*, 11.06.2010, RC/Res.06, see: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed on 23.08.2010.

¹⁰⁷ *Ibidem*, Annex I, emphasis added.

¹⁰⁸ Elements of Crimes use the same description and define the perpetrator as ‘a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.’

impact on the actions can be a perpetrator of the crime of aggression. Such steps taken by the international community can be considered a breakthrough in the codification of the law. Thereby, it seems aggression is going to be the only core crime in the ICC Statute that unquestionably calls for some sort of a representative of the state to be a perpetrator.

Torture. A crime of an extremely important value, which is confirmed by the status of the norm prohibiting it, is torture. However it is also an unusual offence among those of international law, because it is not a core crime for the purposes of the ICC Statute. Torture is only one of the categories of different core crimes, namely war crimes and crimes against humanity.¹⁰⁹ With respect to such a way of regulation it is needless to say that torture follows the requirements of its principal crimes. Thus, when it is a crime against humanity – there is a strict need for the broader political context to be asserted, and when considered as a kind of war crime – the only link to the official element is by the establishment of an armed conflict between states or governmental authorities.

Nonetheless, torture does not only exist as a crime regulated by the Statutes of the international criminal tribunals. Most importantly, its prohibition is codified by the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which entered into force in 1987. It is believed that until then this crime was proscribed by norms of customary international law and that by codifying it in such an international instrument its *ius cogens* character was only confirmed and directly transposed into the form of written law.¹¹⁰ Article 1 of the Convention defines the crime and states that it happens only:

‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’¹¹¹

Such straightforward wording of this Article stresses the inevitable necessity for the perpetrator to hold an official position. It is noticeable that this definition is inconsistent with another rule of international law, i.e. protection by immunities. Moreover, it does not make any distinction as to two kinds of immunities provided. This would suggest that neither personal nor functional immunity would apply since the person has to be acting in an official

¹⁰⁹ Article 7(1)(f) and Article 8(2)(a)(ii) of the ICC Statute. In the ICTY and ICTR Statutes torture is regulated as a kind of crimes against humanity (Article 5(f) and Article 3(f) of the ICTY and ICTR Statutes respectively). The ICTY Statute prohibits it also in Article 2(b) in which grave breaches of the Geneva Conventions of 1949 are regulated.

¹¹⁰ This way e.g. the Lords in the Pinochet Case.

¹¹¹ Emphasis added.

capacity. As Lord Millett's in his reasoning arguing for non applicability of the immunity *ratione materiae* plea said:

'The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence.'¹¹²

Therefore, by the latter sentence, the problem of norms being in opposition to each other seems to be solved by referral to the hierarchy of norms and the fact that otherwise the crime would be 'vacated of content'.¹¹³ It is a significant remark because, even though torture is not one of the core crimes, as an international crime it is one of the very small group of crimes that have a requirement for the perpetrator to hold an official position included in their definition.

To sum up, the majority of the international crimes (for the purposes of individual criminal responsibility¹¹⁴) seem to have within their definition some sort of link to an official element. Either this is an explicit requirement for the offender to act in the official capacity, like in the case of the crimes of aggression, torture or enforced disappearance of persons; or it is only a requirement of asserting a broader political or governmental context which forms a background of the crime. The latter group consists of crimes against humanity or war crimes (when establishment of an armed conflict is necessary). Genocide could be considered as being outside the scope of the aforementioned groups, however the creation of the regime of dual responsibility means that it may in fact have an official element. Therefore, it seems that there are no international crimes for which the responsibility of high state officials could be excluded.

A few interesting conclusions may be drawn from the above. The differentiation of immunities into personal and functional is certainly well-ingrained in the doctrine of international law. The consequences of such a division are profound as the differences between them are easily noticeable. Not only they offer different kind of protection to the officials acting on behalf of a state (immunity *ratione personae* covers both official and private actions and immunity *ratione materiae* shields only official conduct), but also the time

¹¹² The Pinochet Case, p. 277.

¹¹³ R. Cryer *et al.*, *op. cit.*, p. 431.

¹¹⁴ Terrorism or piracy could be considered herein as well, however as they are not the most common of crimes committed within international criminal responsibility of individuals, they stay outside the scope of discussion.

at which they are activated depends on the stage of one's duty (while personal immunities find their rationale when a representative is in office, functional play an important role only after the post is left). Additionally, acts of a high state official may be either official or private, and the latter are not covered by functional immunity. Therefore, it is important to establish that international crimes are not considered official in their nature.

All theories presented in the literature try to justify irrelevance of functional immunity for the purposes of international individual criminal responsibility. To correctly ascertain the group of persons that might be awarded protection of this kind, a closer look at some of the international documents is required. From their analysis it is clear that heads of state, heads of government and some internationally-important ministers, such as ministers of foreign affairs, are included in this prominent group. Cases involving their conduct have occurred frequently throughout history. The Pinochet Case was a landmark decision in which irrelevance of official capacity for former representatives was confirmed. The ICJ, on the other hand, failed to establish a precedent rule by which immunity of incumbent state officials would be taken away. The Yerodia Case was criticised by the scholars on numerous occasions, however the Court did enumerate a few situations in which protection for current state agents would not be available.

No matter the stage of one's duty as a state representative, the authors commenting the cases of individual criminal responsibility aim at establishing a rule of imputability for all kinds of international crimes for these persons. It is confirmed above that the majority of international crimes do have some sort of official element included in their definitions. Both crimes against humanity and war crimes are acts for which a broader context is required, whereas the newly defined crime of aggression as well as torture (even though this one is not a separate type of crime under the ICC Statute) are directly related to holding an official position as a condition *sine qua non*.

This theoretical approach to immunities in international criminal law is necessary to understand the legal perspective from both substantive and procedural point of view.