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Immunity for Heads of State, Heads of Government, Foreign Ministers and Other State Officials

Contribution submitted by the Swedish Delegation

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Abstract

This paper is intended to serve as "food for thought" in an area of international law which is by many perceived as being in a state of transition. Immunity for individuals other than diplomats and as distinct from the concept of state immunity is remarkably unregulated. This paper tries to discern what are the current customary trends with regard to immunity for heads of state and government, foreign ministers and other state officials. Since immunity is mainly perceived as the exemption from different kinds of jurisdiction, questions regarding jurisdiction *per se,* including the current debate on universal jurisdiction, become relevant. The aim of this paper is, however, to focus on the difficulties involving immunities as such and the possible evolution in this area.

The paper starts out with a short examination of the theoretical bases for individual immunity. Theories of the representative character of the head of state and extraterritoriality have evolved alongside a nowadays more prominent emphasis on the functional necessity theory. Immunity is enjoyed foremost in order to ensure efficient international relations.

Furthermore a distinction between procedural and substantive immunity is made. Procedural immunity is the immunity linked to the current status of the official. Substantive immunity is the immunity enjoyed because of the official character of the act performed.

The application of these two kinds of immunity are subsequently analysed with regard to different kinds of acts performed by the relevant actors. The conclusions are that as far as heads of state and government and foreign ministers are concerned, procedural immunity is more or less unrestricted when they are in office. This immunity covers in essence all acts committed regardless of their official or private character both under criminal and private law with very few exceptions. For the same category of people, the principle rule is that on cessation of functions, substantive immunity is intact regarding official acts. For other categories of officials performing international state functions, current customary law mainly provides substantive immunity during and after office. It might be argued that in certain situations, also ministers other than foreign ministers should enjoy a degree of procedural immunity.

The last part of the paper brings to the fore the question of when and under what circumstances immunity should be limited due to personal responsibility for serious international crimes. Outlining the evolution since the Nuremberg trials up to the adoption of the Statute of the International Criminal Court, it is argued that substantive immunity is no longer a shield when it comes to personal responsibility for serious international crimes. This conclusion has, however, been cast in doubt by an *obiter dictum* in the recent judgement by the ICJ in the Yerodia case. Finally, the paper leaves open the question if, especially with regard to the establishment of the International Criminal Court, we will witness a new customary rule evolve where possibly even procedural immunity will have to be limited with regard to responsibility for serious international crimes.

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1 Background

Immunity for heads of state, heads of government, foreign ministers and other state officials is considered essential for the functioning of international relations. Considering the importance of predictability in this area the lack of codification is somewhat surprising. The main rules on immunity for individuals, diplomatic immunity apart, are still to be discerned through customary law and even these rules are often found to be unclear.[1]

This paper tries to ascertain what kind of immunity that can be ascribed to heads of state, heads of government, foreign ministers and other state officials and under which circumstances such immunity is no longer enjoyed. In addition, this paper aims at discussing the scope of the immunity for these categories *de lege ferenda*.

2 Immunity for Individuals

There are several definitions of the concept of immunity. The common understanding is that it refers to under which circumstances a foreign state (or a foreign individual) can claim freedom from legal, executive or administrative jurisdiction of another state.[2]

Traditionally the concept of immunity is regarded to cover the state as well as its agents. The state enjoys immunity by virtue of the principle that all states are equal and that no state may exercise jurisdiction over another state (*par in parem non habet imperium*). The legal basis for immunity for individuals is somewhat disparate and not entirely clear. Diplomats enjoy immunity according to the 1961 Vienna Convention on Diplomatic Relations.[3] Concerning heads of state, heads of government, foreign ministers and other state officials, as indicated above, there is no exhaustive written legal source that covers this subject. For these groups the immunity and its boundaries have instead been established through a mixture of custom, conventions and analogies to conventions.

2.1 Theoretical Basis for Immunity

The historic basis provides three theoretical rationales for immunity, *the representative character theory*, *the principle of extraterritoriality*, *and the theory on functional necessity*. These principles have evolved during centuries with regard both to state (sovereign) immunity, diplomatic immunity and the "modern" conception of head of state immunity (modern in the sense that the head of state no longer equals the state itself and therefore needs immunity rules for his or her own part). It is therefore inevitable that the theories sometimes coincide and that the different kinds of immunity share characteristics from one another. It should in addition be noted that different kinds of immunities for various state agents are not necessarily based on the same rationale.

The *representative character theory* derives its origin from the time in history when the sovereign and the state were in essence regarded as one. Sovereignty emanated from the head of state as a person ("l'État c'est moi"). This characteristic of the sovereign, in conjunction with the principle of *par in parem non habet imperium*, made him untouchable and therefore immune. Modern conceptions of state immunity derives from this characteristic

[1] Compare Barker, J. Craig, *The Future of Former Head of State Immunity after* ex parte *Pinochet*, International and Comparative Law Quarterly, vol. 48 (1999), pp. 937 – 949, p. 938.
[2] In order to limit the scope of the present paper, the much debated issue of universal jurisdiction is not discussed. For the following analysis on immunity a precondition is evidently that jurisdiction is at hand.
[3] Vienna Convention on Diplomatic Relations (1961), UN Treaty Series, vol. 33, p. 290.

of the sovereign. It appears, according to uniform doctrine, that it would be wrong to claim the contrary, i.e. that the original historical basis for the ruler's immunity is derived from the State.

The principle of *extraterritoriality* shares the same perception of sovereign (state) immunity. This theory provides a fiction that while the state agent is in a foreign country where he or she is accredited he or she should, when considering the issue of jurisdiction, be treated as if he she was in his own country, i.e. the sending state.[4]

The theory on *functional necessity* is confirmed by the Vienna Convention on Diplomatic Relations[5] and almost every other convention or agreement on immunities and privileges that exists today. Functional necessity is usually expressed in the way that the subjects shall enjoy privileges and immunities as are necessary for the fulfilment of their tasks. It is often underlined that the underlying reason for granting privileges and immunities to the individuals concerned is not to grant immunity to the individuals themselves because of their personal status but for the benefit of the tasks they are entrusted with. The functional necessity theory is the prevailing explanatory model for granting immunity today. The main aim is the need to ensure a smooth functioning of international intercourse.

It should be noted that different kinds of immunities for different kinds of state agents can be based on a blend of these theories and

2.2 Procedural Immunity (Immunity Rationae Personae*) and Substantive Immunity (Immunity* Rationae Materiae*)*

Regarding immunity for individuals, customary international law makes an important distinction between immunity *rationae personae* and immunity *rationae materiae*. The first is linked to the very person of the head of state (or state representative) in his or her official capacity as head of state (or state representative). The latter is concerned with the act as such where a distinction is made between official acts (acts of state) on the one hand and personal acts, attributable to the person in question acting privately, on the other. Whereas immunity *rationae personae* to a further degree looks upon the individual itself as immune because of his or her official status, immunity *rationae materiae* grants immunity to the individual because of the official and therefore inviolable character of the act committed.

The same individual may at a given point in time enjoy both substantive and procedural immunity, on the one hand having acted on behalf of the state and on the other hand through his or her current official position.

2.2.1 Procedural immunity (Immunity Rationae Personae)

Procedural immunity relates to the official position of a person performing an act, rather than it protects acts performed in the service of a state. The concept of immunity *rationae personae* has its legal basis in the conception of the representative character of the head of state. Earlier conceptions of absolute sovereignty and "dignity" made any claims of restricted immunity impossible.

The modern, functional conception of immunity *rationae personae* is a simple recognition of the official position of the person in question. While in office the subject should be inviolable

[4] Ogdon, Montell, *Juridical bases of diplomatic immunity: a study in the origin, growth and purpose of the law*, Washington, D.C. (1936), p. 63.
[5] Vienna Convention on Diplomatic Relations, preambular paragraph 4.

because of his position. The principle that immunity corresponds with the official status of the person in question is comparable to diplomatic immunity of a diplomat in service.[6]

Immunity *rationae personae* is immediately linked to the person enjoying immunity being in office. During his time in function immunity is non-restricted in so far as it also makes him immune from jurisdiction for acts committed before the taking up of office. On the cessation of the official function, immunity *rationae personae* is no longer accorded.[7]

2.2.2 Substantive Immunity (Immunity Rationae Materiae)

Substantive immunity or immunity *rationae materiae* refers to the immunity accorded to a head of state or an agent when carrying out an official act. In other words, when an official of a state is acting in his or her official capacity, he or she is merely an organ the state; his or her acts are attributable to "the 'collectivity of individuals,' which is the state".[8] Since the acts of the official are not his or her own (they are acts of state) there can be no individual responsibility for these acts.[9] Even so, immunity *rationae materiae* is nevertheless an individual immunity accorded to the head of state or agent.

As the substantive immunity is connected to the character of the act and not the *ex nunc* official position of the state agent, the immunity is intact even if the official position of the agent changes or disappears. In comparison, an example of preserved substantive immunity would be the preserved protection of a former diplomat for acts done while acting on the behalf of the state.[10]

3 Immunity and Criminal and Civil Law

3.1 Heads of State

International Law has traditionally claimed a very wide immunity for heads of state from criminal as well as civil and administrative jurisdiction of another state. The immunity of heads of state has been regarded as almost absolute, i.e. both official and private acts are covered.[11] However, a restrictive view on head of state immunity is not seldom advocated and even applied in state practice.

An express source for head of state immunity can be found in Article 21 of the 1969 Convention on Special Missions[12], which states that a head of state, when leading a mission

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[6] Compare Vienna Convention on Diplomatic Relations, Articles 31 and 39, paragraph 1.

[7] This seems to be an accepted principle in international law. As regards domestic law, it is however not unusual that states grant a certain degree of immunity *rationae personae* to their former heads of state.

[8] Woetzel, Robert K, *The Nuremberg Trials in International Law*, London (1960), p. 68 (Woetzel).

[9] The concept of immunity *rationae materiae* should not be confused with the "act of state-doctrine", although the two are interrelated. According to both Watts and Oppenheim, this "act of state-doctrine" does not primarily concern immunity and jurisdiction but relates to the fact that certain acts of state, although possibly under the jurisdiction of a foreign court, are "non-justiciable" or "call for judicial restraint". As Watts puts it: "they involve issues outside areas where it is appropriate for judicial functions to be exercised." (Watts, Arthur, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, Recueil des Cours, vol. 247, 1994 (3), pp. 9-130, p. 59 (Watts)).

[10] Vienna Convention on Diplomatic Relations, Article 39, paragraph 2.

[11] In *Lafontant v. Aristide* (844 F.Supp. 128, U.S. District Court, E.D.N.Y. (1994) absolute immunity was acknowledged. Compare comment by Dellapenna, Joseph W., in American Journal of International Law, Vol. 88 (1994), pp. 528 – 532.

[12] Convention on Special Missions (1969), UN Treaty Series, vol. 1400, p. 231. As of today only thirty-two states are parties to the convention, but according to Watts "its value as evidence of, or as a contribution to, customary law cannot be disregarded" (Watts, p. 38). However the applicability of the Convention is reduced by the fact that

shall enjoy the "immunities accorded by international law to Heads of State on an official visit." Obviously, the provision does not provide any further insights into the scope of the immunity for heads of state.

3.1.1 Official, Sovereign Acts

Concerning official acts the prevailing view is that heads of state enjoy full protection regarding all forms of jurisdiction,[13] with an exception when it comes to certain international crimes, as will be dealt with below. Concerning official, sovereign acts the head of state enjoys both procedural and substantive immunity. By official, sovereign acts is here referred to state acts *jure imperii*, executed by the head of state.[14]

When in office, the head of state is protected against foreign jurisdiction already because of his immunity *rationae personae*. When the head of state is no longer in function, the official character of these acts still protects the former head of state because of the immunity *rationae materiae*. With regard to these official acts, the substantive immunity was self-evidently there even during the time that the head of state held its function. The more or less unrestricted procedural immunity however makes the discussion on whether the acts are official or not redundant while the head of state is still in office.

What is interesting is how to deal with the issue when the head of state is no longer in office. As stated above, he or she will normally be protected by the immunity *rationae materiae*. However, this is where a discussion on an eventual limitation of immunity for serious international crimes becomes poignant.[15]

3.1.2 Official, Non-Sovereign Acts

It may, however, be possible to discern a trend moving towards a more limited immunity for heads of state concerning official acts which are of a non-sovereign character, i.e. those essentially within private law such as commercial acts. According to some, state immunity in this area is becoming increasingly circumscribed, which could possibly affect the immunity of heads of state.[16] The idea is that to the extent that the state can be held accountable for a particular act, the same should apply to a head of state officially performing that particular act. But disregarding a few states' legislation (United Kingdom and Australia) and some very rare cases pointing in the direction of restrictive immunity, state practice and *opinio juris* regarding these kind of acts are probably similar to the approach regarding official, sovereign acts. Protection through procedural immunity is accorded when in office and afterwards through substantive immunity.

3.1.3 Non-Official Acts Under Domestic Criminal Law

The immunity concerning domestic criminal jurisdiction in another state is usually regarded as absolute by reason of procedural immunity. If substantive immunity is going to provide

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it only affects "special missions" in the meaning of the Convention, i.e. temporary missions with the consent of the sending state sought in advance, etc. (Article 1 and 2 of the Convention).

[13] This view is supported not only by legal writers but also by a line of jurisprudence, compare Watts, p. 58.

[14] Some scholars argue that the distinction between *acta jure imperii* and *acta jure gestionis*, used with regard to state immunity, is not applicable in the area of individual immunity. The doctrinal debate as well as laws adopted in certain states shows the opposite.

[15] See section 4 below.

[16] See for instance Watts, pp. 60-61. Bröhmer rejects this connection between state immunity and immunity for heads of states; Bröhmer, Jürgen, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*, Leiden Journal of International Law, vol.12 (1999), pp. 361 – 371, p. 368.

protection on cessation of functions depends on the character of the criminal act. As customary law stands today, procedural immunity probably protects the head of state in office.[17] No longer in function, there is no reason why a former head of state should be protected for privately committed criminal acts; substantive immunity is not even an issue. As to immunity or not from international crimes (which can also be incorporated into domestic criminal law), see section 4.

3.1.4 Non-Official Acts Under Private Law

Another factor that modifies the immunity of heads of state, is the still somewhat unclear status of purely private acts. State practice on this question is uneven and so are the opinions in the doctrinal debate.[18] The most far-reaching solution is exemplified by *Lafontant v. Aristide* where head of state immunity was considered absolute. In other cases, the immunity for private acts is partly built upon an analogy with the immunity for diplomats according to the 1961 Vienna Convention on Diplomatic Relations, Article 31, paragraph 1, which recognises a fairly wide immunity:

"[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction,[…]"

The latter is subject to certain exceptions.[19] Whether or not these exceptions should apply to immunity from civil and administrative jurisdiction for heads of state is uncertain but some signs have even been shown in the direction of granting heads of state immunity solely for their official acts and thereby suppressing procedural immunity as a whole.[20]

The current position of customary law probably provides procedural immunity for private acts when in office with, possibly, a certain amount of exceptions, but even the room for any exceptions is debatable. If emphasis lies on the position as a representative character of the state, it follows for instance that heads of state are protected both on official and private visits.[21] What is important though is that once the head of state is no longer in function, the principle of substantive immunity does not protect against jurisdiction concerning private acts. (The fact that it can be a difficult task to define what is a private act and what should be regarded as an act of state, is a different issue).

3.2 Heads of Government and Foreign Ministers

To a certain extent immunity is also enjoyed by heads of government and foreign ministers. Custom and jurisprudence in this area is however even more ambiguous and incoherent

[17] It could of course be argued that if keeping to the functional necessity theory, it is hard to defend the necessity in allowing a head of state to go free from jurisdiction when committing for example a simple murder. In the absence of jurisprudence concerning such a case it is difficult to judge what the outcome would be today. It is probably easier to argue procedural immunity (and to deal with the problem through political channels).

[18] Watts, pp. 64-66.

[19] The exceptions regard acts relating to private immovable property, matters of succession and inheritance, and private commercial activity (Article 31, paragraph 1, subparagraphs a) – c)).

[20] The Institute of International Law (IIL) decided at its session in Vancouver 2001 on a resolution concerning immunities for heads of state and government "[w]ishing to dispel uncertainties encountered in contemporary practice pertaining to […] the immunity from jurisdiction […] that a Head of State or Head of Government can invoke […]." According to the Article 3 of the Resolution, heads of state only enjoy immunity for acts performed in the exercise of their official functions. This seems to be a very narrow interpretation of customary law, if indeed it is.

[21] Zappalà, Salvatore, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation*, European Journal of International Law, vol. 12 (2001), pp. 595-612, p. 599.

than regarding immunity for heads of state.[22] As a start, it could be acknowledged that immunity *rationae personae* is much less an issue for this category. In the words of Watts:

"[…] heads of government and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally."[23]

However, to claim that heads of governments and foreign ministers have no procedural immunity is probably to stretch the meaning of Watts' reasoning above a bit too far. According to Article 31 of the 1969 Convention on Special Missions, when on a special mission they enjoy unrestricted immunity from criminal jurisdiction of another state and with certain exceptions from civil and administrative proceedings as well.[24] With a functional view on the purpose for granting immunity and with regard to the modern constitutional character of many states (compare for instance those states where the head of state, in comparison to the head of government is a mere symbolic figure, void of any political power) it would seem quite illogic not to grant heads of government a rather wide immunity *rationae personae* while in office. Certain heads of government have to a large extent been set to represent their state in a way which was usually performed by their heads of state.[25]

However the emphasis is of course on immunity *rationae materiae*. Heads of government and foreign ministers are in function in order to carry out certain tasks on behalf of the state. Any immunity accorded should in essence be linked to such acts of state. But because of the rather wide representative functions of this category of officials, they enjoy immunity from criminal jurisdiction while in office. When it comes to limitation of immunity for serious international crimes, see section four below.

3.3 Other State Officials

Apart from heads of state and government and foreign ministers, state visits and international relations are also performed by other state officials. Immunity for this category is very sparsely discussed in the literature and jurisprudence more or less non-existent. A special case is that the 1969 Convention on Special Missions states that "persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State, in addition to what is granted be the […] Convention, the facilities, privileges and immunities accorded by international law" (Article 21, paragraph 2).

It could be argued, on the basis of the functional theory, that ministers should have a more circumscribed immunity than heads of governments or foreign ministers. This would follow from the assumption that the latter have wider international tasks and commitments than other ministers. On the other hand, where ministers do perform tasks on the international level, there is really no reason why their protection (immunity) should be less than that of the foreign ministers. The latest developments are evidence of the wider distribution of power in international relations to ministers other than the foreign minister. The reasons for granting immunity (predictability, the need for international relations unhampered by fear of prosecution) are essentially the same, notwithstanding the title of the minister acting.

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[22] See however the recent judgement of the ICJ in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* delivered on the 14 February 2002, referred to separately under section 4.4.

[23] Watts, pp. 102-103.

[24] According to Watts, article 31 of the convention is a reflection of the limited state practice there is in this area (Watts, p. 106).

[25] In those cases it could be questioned whether there is any functional reason for the heads of state of those states to still enjoy immunity (if not for mere historical and traditional purposes).

However, there is no apparent customary law granting ordinary state officials immunity *rationae personae*, even though some might argue that there should be a development to that effect. When acting in their official capacity, ordinary state officials are protected by immunity *rationae materiae* and as for their responsibility for serious international crimes, it is the same as for anybody else.

4 Limitation of Immunity for International Crimes

As has been discussed above, heads of state, heads of government, foreign ministers and other state officials enjoy immunity to a varying degree and on different grounds. However, the fact that these groups are granted immunity against proceedings in various matters does not say anything as to when and under what circumstances immunity should be limited or differently put at what point it is no longer acceptable to claim that immunity is at hand. International co-operation and communication would be severely hampered if officials of a state were not able to travel freely to perform the functions of the state from fear of prosecution. However, on the other hand there is an interest of prosecuting perpetrators of serious crimes falling under international law. There is evidently a need to strike a balance between these two different interests.

It might be worthwhile to take a closer look at the question, from the perspective of the different war crimes tribunals since World War I. Statements from some of the different commissions which have discussed the question could also provide some guidance.

4.1 Evolution of the Principle of Individual Responsibility and Limitation of Immunity

Since 1919 there have been five international commissions of inquiry,[26] four *ad hoc* international tribunals[27] and three prosecutions in domestic courts based on an international mandate.[28] The evolution of the principle of individual responsibility and limitation of immunity is best understood through a historical analysis of the work of some of these institutions.

4.1.1 World War I and Wilhelm II

In 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented its final report to the upcoming Preliminary Peace Conference.[29] Concerning personal responsibility the Commission stated that "there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility […]. This extends even to the case of heads of states".[30] On the possible objection that heads of state hold immunity against criminal proceedings, the Commission stated that "it would

[26] (1) The 1919 Commission on the Responsibility of the Authors of War and the Enforcement of Penalties; (2) The 1943 United Nations War Crimes Commission; (3) The 1946 Far Eastern Commission; (4) The 1992 Yugoslavia Commission of Experts; (5) The 1994 Rwanda Commission of Experts.
[27] (1) The International Military Tribunal (the "Nüremberg trials") 1945; (2) The International Military Tribunal for the Far East (the "Tokyo trials") 1946; (3) The International Criminal Tribunal for the former Yugoslavia; (4) The International Criminal Tribunal for Rwanda.
[28] (1) Leipzig Trials (1921-1923); (2) Prosecutions in the European Theater Pursuant to Control Council law 10 (1946-1955); (3) Prosecutions in the Far East Pursuant to the directives of the FEC.
[29] Reprinted in American Journal of International Law: *Report to the Preliminary Peace Conference*, AJIL, Vol. 14 (1920), p. 95 – 154.
[30] *Ibid*., p. 116.

involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilised mankind." [31]

The strong wordings of the Commission were possibly reflected in the Treaty of Versailles.[32] Article 227 of the treaty provided that the German Emperor Wilhelm II should be held responsible for his "supreme offence against international morality and the sanctity of treaties". The defeated Germany was obligated to comply with the legal proceedings because of its aggression. However, the attempt to impose individual liability on Emperor Wilhelm II was not successful. The Netherlands granted the emperor asylum since the Dutch government did not perceive that there was an international obligation to extradite him. In the Dutch note it was made clear that the state responsibility that could be attributed to Germany could not be transferred onto the Netherlands, a state that was not even a party to the Treaty of Versailles.

It is not at all clear whether the Treaty of Versailles and the charges made under it can be seen as a precedent for the Nuremberg Trials. It should in this context be noted that Wilhelm II faced charges on moral and political grounds, while the defendants in the Nuremberg trials were charged with crimes against international law and customs of warfare.[33]

4.1.2 The Nuremberg Trials

During the trials in the aftermath of World War II, several of the German leaders were attributed criminal responsibility, among others Dönitz, von Ribbentrop and Göring.

The following is said on immunity in the judgement of the Nuremberg Tribunal:

"It was submitted that International Law is concerned with actions of sovereign States and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. […]

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. […]

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts, which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

[31] *Ibid*. Apparently the argument did not convince the American delegates at the Peace Conference, who were opposed to the recommendations and claimed that "the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty" and that a sovereign can only be responsible to his own people (at p. 148 of the Report).
[32] Woetzel, p. 30. See also a number of other treaties from this time, which confirm the principle of individual responsibility, in: Jones, John R. W. D., *The Practice of the Criminal Tribunals for the Former Yugoslavia and Rwanda*, New York (1998), p. 63.
[33] Woetzel, p. 35.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under International Law."[34]

As seen in the quote, the tribunal started out with confirming the view that gained acceptance in between the wars[35] that individuals can have international responsibility for crimes. More importantly, the tribunal then moved on to rejecting substantial immunity, whereby an official would be protected in international law for acts which are carried out by him on behalf of the state. In the opinion of the tribunal, acts of state that are taken outside the competence of the state are not protected by immunity; hence, the claim for substantive immunity was rejected.

Regarding procedural immunity, it should be noted that the defendants no longer held their official positions; therefore immunity on this basis was not considered.[36]

4.1.3 The Tokyo Trials

At the trials in Tokyo following the end of World War II a number of Japanese high officials were arraigned. (Emperor Hirohito was not prosecuted, possibly due to his role of a mere figurehead in the Japanese governmental machinery.[37]) Concerning the question of immunity, the Tokyo Tribunal took a view corresponding to that of the Nuremberg Tribunal; individuals can be subjects of international law and immunity *rationae materiae* cannot be applied for purposes of individual immunity when the acts in question are "condemned as criminal by international law".[38]

4.1.4 The International Criminal Tribunal for Rwanda (ICTR)

In what is more or less a blueprint of Article 7 of the Nuremberg Charter, the Statute of the ICTR, Article 6, paragraph 2, states:

"The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

The Prime minister of Rwanda during the Rwandan tragedy, Jean Kambanda, was attributed responsibility for genocide and crimes against humanity. In the judgement and the following appeal, the reasoning mainly concerned issues of the right to a legal council of one's own choice, lawfulness of detention, validity of a plea-agreement and mitigating factors. In the final verdict (19 October 2000), there is no discussion concerning the issue of immunity. However, any reasoning concerning immunity would have concerned substantive immunity

[34] This extract from the Nuremberg judgement is taken from: *Nazi Conspiracy and Aggression: Opinion and Judgement*, Office of United States Chief of Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington (1947), p. 52-53.
[35] According to Woetzel, national courts around the world increasingly accepted the concept of individual liability for some crimes directly under international law (Woetzel, p. 36).
[36] Woetzel, p. 72-73.
[37] *Ibid*., p. 229.
[38] *Ibid*., p. 231.

only, since, by the time of the indictment, Kambanda was no longer prime minister of Rwanda.

There are now a number of former Rwandan ministers and other state officials awaiting trial. It is unlikely that any of these will try to claim substantive immunity, bearing in mind the Rwanda Tribunal Statue and the legacy of the Nuremberg Trials.

4.1.5 The International Criminal Tribunal for the Former Yugoslavia (ICTY)

Article 7, paragraph 2, of the Statute of the ICTY and the following judgements confirm the principle of criminal responsibility for serious international crimes and the limitation of substantive immunity for state agents.

One of the new legal developments with the ICTY was the indictment against an acting president, Slobodan Milosevic. If incumbent presidents and other individuals enjoying immunity through their official position may be indicted and put before a tribunal, the consequence would be that criminal responsibility for international crimes also removes procedural immunity. It is unclear if we are witnessing the establishment of a new legal regime. According to the Commentary to the Princeton Principles on Universal Jurisdiction neither the statutes of the ICTY, nor those of the ICTR address procedural immunity.[39] And it must be admitted that both Article 6, paragraph 2, of the ICTR Statute and Article 7, paragraph 2, of the ICTY Statute which express the same principle that was laid down in Article 7 of the Nuremberg charter are foremost dealing with substantive immunity.

4.1.6 The International Law Commission

In 1996 the International Law Commission (ILC) presented a Draft Code of Crimes against the Peace and Security of Mankind. Article 7 states that:

"[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as a head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".

The article appears to refer to substantive immunity in that it emphasises on criminal responsibility and in its commentary to the Draft Code, ILC points out that Article 7 is a confirmation of Article 7 in the Nuremberg Charter and the subsequent reasoning in the Nuremberg Trials as well as of the corresponding articles in the Statutes for the Criminal Tribunals of the former Yugoslavia and Rwanda.

However, the ILC then moves on to saying that Article 7 of the Draft Code is intended to prevent individuals from invoking substantive and procedural immunity. "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence." The exact meaning of the commentary is a bit unclear in the quoted section, but a possible conclusion is that procedural immunity should be limited (for certain crimes) to the same extent as substantive immunity. If this is the true meaning of the commentary, it might be seen as having been a source of inspiration to the Rome Statute of the International Criminal Court.

[39] The Princeton Principles, p. 50 see footnote *infra* nr. 42.

4.2 Immunity According to the Statute of the ICC

The 1998 Rome Statute of the International Criminal Court is soon to enter into force and it is therefore of particular interest to study its provisions on immunity. From Article 27 of the Statute follows that the Statute applies to all persons without any distinction based on official capacity or position.

Article 27
Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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

Article 27, paragraph 1, is mainly dealing with the non-exemption from criminal liability; Article 27, paragraph 2, envisages the question of jurisdiction. It has been claimed that the first paragraph refers to substantive immunity whereas the second paragraph refers to procedural immunity.

Article 27, paragraph 1, more or less copies the provisions of earlier war crime tribunals. Accordingly there is no direct reference to immunity but rather to the fact that a person is not exempt from criminal liability on the ground that he or she is a state official. Clearly Article 27, paragraph 1, refers to substantive immunity. Thus, a head of state or state official cannot claim non-responsibility of the crime (or mitigation) because of immunity *rationae materiae*.

The novelty is that Article 27, paragraph 2, furthermore points out that "[i]mmunities […] which may attach to the official capacity of a person, […] shall not bar the jurisdiction of the Court from exercising its jurisdiction over such a person." This can be seen to reflect a reference to procedural immunity. The second paragraph is thus a departure from earlier customary law since procedural immunity up until now has been viewed as more or less absolute. Since the Statute is not yet in force and as there is no clear case law to the same effect it is hard to draw any conclusions regarding the exact effective outcome of this provision.[40] It is however far too early to claim that this complete limitation of immunity would already be customary law, or even the prevailing view, regarding national criminal jurisdiction.[41]

4.3 The Princeton Principles

The Princeton Project, convened at Princeton University in January 2001, was an effort by a diverse assembly of mainly American legal scholars and jurists to reach a consensus and

[40] As a moderating factor when it comes to these rather sensitive issues, it has to be noted that a state's ratification of the Statute is regarded as an implicit waiver of immunity for its heads of state and other state officials.
[41] It is interesting to note however that the principle provided for in Article 27 of the Statute is said to have been uncontested throughout the discussions leading up to the adoption of the Statute and that "it was relatively easy to agree on its formulation" (Saland, Per, 'International Criminal Law Principles' in *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Result*s (ed. Lee), The Hague (1999), p. 202).

codify contemporary international law on universal jurisdiction into a list of principles.[42] The principles advocate universal jurisdiction with regard to certain serious crimes under international law. On "immunities", Principle 5 states that:

With respect to serious crimes under international law […] the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

As we can see the wording is more or less the same as in the provisions of the international criminal tribunals and similar to the first paragraph of Article 27 of the Statutes of the ICC. Heads of state and their equals cannot hide behind substantive immunity with regard to serious international crimes. However, there is no reference to procedural immunity as such. In addition, the commentary to the principles is extremely clear on the fact that as customary law stands today immunity *rationae personae* is intact. "Immunity from international criminal prosecution for sitting heads of state is established by customary law, and immunity of diplomats is established by treaty."[43] "Under international law as it exists, sitting heads of state, accredited diplomats, and other state officials cannot be prosecuted while in office for acts committed in their official capacities."[44] "A head of state, diplomat, or other official may, therefore, be immune from prosecution while in office, but once they step down, any claim of immunity becomes ineffective and they are then subject to the possibility of prosecution."[45]

In general, the principles reject substantive immunity but argue in favour of procedural immunity as a feature of customary law. As is shown by the quotes the commentary is sometimes slightly inconsistent. If heads of state and other state officials while in office are protected for acts committed in *their official capacities*, one could question if non-official acts are then not covered. What is the use of immunity *rationae personae* if it mainly covers official acts, are we then not actually talking about immunity *rationae materiae*?

4.4 The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)

On the 11 April 2000 a Belgian investigating judge issued an international arrest warrant *in absentia* against the then incumbent foreign minister of the Democratic Republic of Congo. The judge charged him with offences constituting grave breaches of the Geneva Conventions and with crimes against humanity, allegedly performed before his taking up of office. According to Article 5, paragraph 3, of the Belgian law under which the arrest warrant was issued[46], when applying its 'universal jurisdiction', immunity attaching to the official capacity of a person should not prevent the law from being applied.

On the 14 February 2002, the International Court of Justice found by thirteen votes to three, that the issue of the arrest warrant and its international circulation constituted violations of a legal obligation of Belgium towards the Democratic Republic of 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 Congo enjoyed under international law"[47]

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[42] For a detailed report of the project including the principles and a commentary, see *The Princeton Principles on Universal Jurisdiction,* Princeton University, New Jersey (2001).
[43] The Princeton Principles, p. 48.
[44] *Ibidem*, p. 49.
[45] *Ibidem*, p. 51.
[46] Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto" as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law".
[47] At paragraph 78 of the judgement.

The rationale of this finding is that in order to carry out his or her functions, a foreign minister should enjoy full immunity from criminal jurisdiction and inviolability and this regardless of the character of any acts committed.[48] For the sake of the proper functioning of international intercourse, a sitting foreign minister should enjoy unlimited immunity *rationae personae* in relation to the national jurisdiction of another state.

An interesting part of the judgement is where the Court in an *obiter dictum* evolves on criminal responsibility and the fact that immunity is not the same as impunity. At paragraph 61, point 4, the Court reasons that substantive immunity, to a certain extent, protects a former foreign minister. It should be pointed out that the Court does not explicitly deal with the question if immunity could be limited because of serious international crimes.

This could be better understood if read together with the separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, stating that immunity from jurisdiction is the exception to a normative rule which would otherwise apply; the normative rule being the ordinarily exercised jurisdiction leading to a trial of the responsibility for the alleged crimes.[49] As further explained by the three judges:

"The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office."[50]

All in all, the main conclusion that is possible to draw from the case is that according to the International Court of Justice, foreign ministers in office enjoy total procedural immunity. Given that the case in its operative parts only deals with the issue of incumbent foreign ministers, it is not possible to ascertain with certitude what would have been the outcome if the judges would have had to apply the difficult distinctions regarding substantive immunity.

[48] At paragraphs 54 and 55 of the judgement.
[49] At paragraph 71 of the joint separate opinion.
[50] Paragraph 72 of the joint separate opinion.

4.5 Limitation of Immunity – de Lege Lata *and* de Lege Ferenda

As shown from the exposé above, the matter of immunity for heads of state or government and other state officials with regard to international crimes is by no means a clear or easily manageable area of law. Returning to the distinction between immunity *rationae materiae* and immunity *rationae personae*, there should be no doubt concerning the fact that immunity *rationae materiae* is no longer a means of protection against international jurisdiction for serious international crimes. What is still an issue is how to deal with the procedural immunity. To what extent should acting heads of state and other state officials be able to hide behind their official capacity?[51]

We are dealing here with two opposite interests, on the one hand the need for a smooth functioning of international intercourse and on the other hand an increasingly common view that human rights issues transcend such concerns and that people should not be able to avoid prosecution, regardless of their status and function.

As to the first interest, it could be argued that the state interest that heads of state and government, foreign ministers, and other state officials are able to travel and meet without facing the threat of being prosecuted is a compelling argument for not changing the customary provisions of immunity. It would be unfortunate if a practice was developed whereby countries in conflict were not able to carry out state visits and keep up ordinary diplomatic relations. The Princeton Project seems to reflect this view.

As for the second interest, it is inevitably so that the former inviolable character of the head of state and state officials in office is becoming more and more questioned. One could seriously wonder whether the functional necessity theory is compelling enough to cover horrendous crimes. A new custom may be evolving. The prime example is the ICC Statute, where it is clear that, when it comes to serious crimes under international law (i.e. those covered be the Statute), the Court exercises jurisdiction regardless of official positions and functions.

The position of current customary law is probably that immunity *rationae personae* prevails. However, with more and more states ratifying the ICC Statute, a custom may evolve whereby even sitting heads of state and other state agents will have to be more careful. The Rome Statute makes no difference between the two kinds of immunity with respect to limitation of immunity, and the question is why states should do so in their domestic jurisdictions. It should be pointed out that by ratifying the Rome Statute, states have voluntarily waived both types of immunity permanently for their own heads of state and other state agents who normally enjoy immunity. In the light of this, national legislators might draw the conclusion that they can enact the same kind of provisions with regard to domestic courts. One should also note the argument that states who have accepted the Rome Statute have thereby accepted that they may empower an international court to exercise jurisdiction for these crimes over high officials even of third states, i.e. non-parties to the Statute; this fact might be taken to indicate that states believe that they have that power for themselves. The future will show how far states are willing to go in this respect.

[51] This paper does not discuss the difficulties in defining what are "serious international crimes", or so called "core crimes" and if there are "non-serious international crimes". The area is vague and legislation shows different approaches. In order to create more clarity, the question of definition should definitely be discussed and analysed.

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ANNEX

Charts on Immunities for Heads of State and Government, Foreign Ministers and Other State Officials

The present charts try to describe where current customary law stands today concerning when immunity is enjoyed or not for different acts. Therefore, the coming limitation of procedural immunity for international crimes (e.g. within the jurisdiction of the ICC) is not included.

Heads of state, heads of government and foreign ministers

	Procedural Immunity (i.e. while in office)	*Substantive Immunity (in general)*	*No substantive immunity) for international crimes*
Official, sovereign acts	Full protection	Full protection	X
Official, non-sovereign acts	Full protection	Full protection	X[1]
Private, criminal acts	Full protection	No protection	-
Private, private law acts	Full protection[2]	No protection	-

[1]in the case such an act would be considered an international crime
[2]possibly with certain exceptions

Other officials

	Procedural Immunity (i.e. while in office)	*Substantive Immunity (in general)*	*No substantive immunity) for international crimes*
Official, sovereign acts	No protection[3]	Full protection	X
Official, non-sovereign acts	No protection[3]	Full protection	X[1]
Private, criminal acts	No protection[3]	No protection	-
Private, private law acts	No protection[3]	No protection	-

[1]in the case such an act would be considered an international crime
[3]except while on special missions