

Uniwersytet Wrocławski
Wydział Prawa, Administracji i Ekonomii
Katedra Prawa Międzynarodowego i Europejskiego
Studia Stacjonarne Prawa
jednolite magisterskie

Aleksandra Maria Dłubak

THE IMMUNITY OF HIGH STATE OFFICIALS IN
RELATION TO THEIR INDIVIDUAL RESPONSIBILITY
IN INTERNATIONAL CRIMINAL LAW

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dr hab. Artura Kozłowskiego

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List of abbreviations

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| A.J.I.C.L. | African Journal of International and Comparative Law |
| A.J.I.L. | American Journal of International Law |
| C.L.F. | Criminal Law Forum |
| Ch. | Chapter |
| D.L.J. | Duke Law Journal |
| E.J.I.L. | European Journal of International Law |
| EAW | European Arrest Warrant |
| EU | European Union |
| Euro. Law. | European Lawyer |
| GA | General Assembly of the United Nations |
| I.C.L.Q. | International & Comparative Law Quarterly |
| I.L.M. | International Legal Materials |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| ILC | International Law Commission |
| IMT | International Military Tribunal |
| IMTFE | International Military Tribunal for the Far East |
| J.C. & S.L. | Journal of Conflict & Security Law |
| J.I.C.J. | Journal of International Criminal Justice |
| L.J.I.L. | Leiden Journal of International Law |
| SC | Security Council |
| SCSL | The Special Court for Sierra Leone |
| SIA | 1978 State Immunity Act, United Kingdom |
| UK | United Kingdom |
| UN | United Nations |
| VCDR | 1961 Vienna Convention on Diplomatic Relations |
| VCLT | 1969 Vienna Convention on the Law of Treaties |
| Y.I.L.C. | Yearbook of the International Law Commission |

Introduction

International law encompasses a variety of fields present in the modern lives of people worldwide. It is not only limited to economics and interstate relations but it also touches the existence of every person by protecting human rights in the international legal order. Due to the diversity of subjects covered by international law, many new branches were developed as separate disciplines of study. One of them – international criminal law – emerged as a response to the atrocities that were committed during the Second World War. Deriving its origin from its precursors such as international humanitarian law and human rights law, international criminal law established a system of criminal liability for the perpetrators of crimes of the highest gravity. Through this, international individual criminal responsibility was founded and together with its essential elements, created the necessary framework enabling the prosecution and punishment of individuals involved in the commission of international crimes. Although at first sight the structure itself seems well-designed, an insight into its practical application is necessary to notice the difficulties encountered on the way to bringing some perpetrators to justice. The obstacles which seem to hinder this structure mostly are immunities awarded to high state officials suspected of the commission of crimes. This protection is given to them for the reasons of the functions they perform and their role in the international arena as the representatives of states. Indeed, it is often the case that a high official of a state, served with charges by an international court, tends to avoid being involved in prosecution by excusing himself or herself with immunities. Depending on whether they are still in office or have left it already, either personal or functional immunities are invoked. However, the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, followed by the creation of the International Criminal Court, changed the up-till-then widely accepted tendency to grant immunity without any reservations to the highest representatives of a state. At the moment the law on immunities in international criminal law is not so straight-forward. Alongside diplomatic and consular immunities, the immunity of high state officials stems from the State immunity. However, as long as the protection of diplomats and consular officers is clearly regulated by international conventions on the matter, the immunity of states' representatives raises numerous questions as far as its scope is concerned. The lack of a universal treaty that would regulate the problem entirely, together with the inconsistent

case law of the international courts which presents contradictory opinions does not simplify the situation. Since this subject-matter seems to cause dilemmas in many respects, it appeared interesting to evaluate these and thoroughly analyse the problem. This thesis aims at clarifying the current state of immunities of high state officials for the purposes of administering justice in international individual criminal responsibility.

As will be argued further below, immunities are gradually losing their validity when compared to norms as important as those expressing the need of bringing the perpetrators of crimes in front of an impartial court. This need is supported by rules on internationally recognised human rights as well as by the noticeable pursuit of the international community to put an end to hostilities and attacks on civilian populations which amount to international crimes. The statutory instruments of both the *ad hoc* Tribunals and the ICC as well as other hybrid jurisdictions (such as the Special Court for Sierra Leone) prove that the objective of restoring international justice requires immunities to be deemed irrelevant.

The thesis' structure is divided into three main categories, reflected in the three chapters. The first chapter presents the theoretical basis for immunity in international criminal law. It distinguishes between the subjective and objective scope of immunity. The former relates to the typology of the notion and explains the term 'high state officials'. The latter concerns the deeds that might be covered by immunities, namely the scope of international crimes, and the reasoning that justifies the relinquishment of the protection despite its initial application. The substantive and procedural laws on immunity are subjects of the following chapters. The rules on immunity in international legal acts as well as their status in the hierarchy of norms in public international law are presented in the second chapter. It is argued that the irrelevance of the immunity of highest representatives of a state has evolved into a customary law rule which has some important consequences. The third chapter is focused solely on the matters of cooperation between the international courts and the states on which they depend, as far as execution of the courts' orders and requests is concerned. Two kinds of states are distinguished – State-Parties of the ICTY, the ICTR and the ICC respectively, and third states, including some Member States that are unwilling to assist these institutions for various reasons. Cooperation of the states is very important because without it the surrender of persons wanted by the courts might not be possible, especially when acting on behalf of a state and protected therefore. This chapter closes the deliberations on immunities in individual criminal responsibility in international law.

The research conducted for the thesis is mainly based on the analysis of legal documents which relate to immunities of high state officials in international criminal law

as well as some literature providing the necessary theoretical background. The former are *inter alia* the Statutes of the ICTY and the ICTR as well as the Statute of the International Criminal Court. However, other United Nations instruments are also important, such as the Resolutions establishing the *ad hoc* Tribunals and – as far as the powers of the Security Council are concerned which can influence the functioning of the courts – the Charter of the United Nations. Additionally, the relevant case law of these judicial bodies constitutes an essential part for the accurate examination of the subject-matter. Some famous cases are evaluated in detail, such as those of Pinochet, Yerodia, Karadžić, Taylor and Bashir. A valuable theoretical input is provided by the writings of some well-known scholars, among them Rosanne Van Alebeek, Paola Gaeta, Dapo Akande and Antonio Cassese. Some particularities of the problem are explained based on international journal articles and various online databases. Notwithstanding the initial impression of the lack of sources on the matter of immunities in international criminal law, the availability of the literature is astounding; however only in English, as in Polish it is rather limited to general remarks.

In recent times the issue of immunities often occurs in relation to arrests of suspected perpetrators which are performed in the exercise of courts' requests. For this reason this thesis is believed to be a valuable contribution to the current development of international criminal law with respect to the immunities of persons involved in the commission of the worst international atrocities.