IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

S. Janagan, B.A.LL.B., Lawyer

ABSTRACT

The immunity of state officials from foreign criminal jurisdiction has long been a cornerstone of international law, protecting heads of our state and senior officials from external interference while preserving diplomatic relations. Yet, the modern insistence on accountability for *jus cogens* crimes genocide, torture, war crimes, and crimes against humanity has unsettled this traditional doctrine. This article traces the evolution of official immunity through landmark cases such as *Pinochet*, *Al-Bashir*, and *Taylor*, examines the tension between Articles 27 and 98 of the Rome Statute, and highlights the role of hybrid tribunals and the International Law Commission's Draft Articles in redefining limits of immunity. The study also situates these legal principles within contemporary diplomatic crises, including the India–Pakistan and Canada–India embassy disputes, demonstrating how political manoeuvring intersects with formal legal norms. Ultimately, the article argues that while sovereign immunity remains vital for interstate relations, the expanding imperative for individual accountability signals a recalibration of international law, bridging the gap between legal theory, global justice, and the realpolitik of diplomacy.

Introduction

The immunity of state officials from foreign criminal jurisdiction is a foundational tenet of international law, grounded in the doctrine of sovereign equality and the maxim *par in parem non habet imperium*, *no state may exercise authority over another*[1]. The doctrine exists to preserve diplomatic stability and ensure that states can interact as equals, free from coercive interference by foreign courts. Yet the accelerating demand for accountability for genocide, torture, war crimes, and crimes against humanity has unsettled this balance, compelling a re-examination of the scope of official immunity. The resulting debate between sovereign independence and global justice lies at the core of twenty-first-century international law.

Forms of State Official Immunity

State officials benefit from two interrelated but distinct forms of protection: **personal immunity (ratione personae)** and **functional immunity (ratione materiae)**.

a) Personal Immunity (Ratione Personae) : -

Personal immunity covers a narrow class of high-ranking officials—heads of state, heads of government, and foreign ministers shielding them from the criminal jurisdiction of foreign states for *both official and private acts* during their tenure. The International Court of Justice (ICJ) affirmed this in the *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*[2], holding that the Belgian arrest warrant against the sitting Congolese foreign minister violated customary international law because such officials must remain free to perform their diplomatic functions unimpeded. Personal immunity flows from status rather than conduct, it expires when the official leaves office but remains absolute while in post. This decision created a liberty among the ambassadors and state officials around our global nations, pivoting us to a more liberalized and cooperative exchange system.

b) Functional Immunity (Ratione Materiae) : -

Functional immunity protects officials, current or former, for acts performed in an official capacity acts deemed to be those of the state itself. This immunity survives the individual's

[1] *See generally* Ian Brownlie, *Principles of Public International Law* 323 (9th ed. 2019).
[2] *Arrest Warrant of 11 Apr. 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 I.C.J. Rep. 3, ¶ 70 (holding that serving foreign ministers enjoy absolute immunity from foreign criminal jurisdiction).

tenure because its rationale lies in preserving the state's sovereign acts from external adjudication. However, the modern consensus, reflected in *R v. Bow Street Magistrate, ex parte Pinochet*[3], rejects functional immunity for acts constituting *jus cogens* violations such as torture. The reasoning given is clear torture, genocide, and similar crimes can never be considered legitimate state functions. Thereby enforcing a protective framework for our foreign state officials. However, the consensus at present being that if the same has been committed by a non-state actor situated within their state, the decree of accountability might slightly reduce. Which is unaccepted and morally degrading.

Challenges From The International Criminal Court(ICC)

The Rome Statute of the International Criminal Court (ICC) represents a decisive move toward accountability. Article 27 provides that official capacity "shall in no case exempt a person from criminal responsibility," thereby abrogating both personal and functional immunities before the Court[4]. This provision, however, collides with Article 98[5], which prohibits the ICC from compelling a state to surrender an official if doing so would breach that state's international obligations regarding immunity.

The tension between these two provisions surfaced dramatically in the ICC's pursuit of Sudanese President *Omar al-Bashir*, indicted for genocide and crimes against humanity in Darfur. Several member states declined to arrest him during official visits, invoking Article 98 and their obligations under customary international law[6]. The ICC Appeals Chamber's 2019 decision nevertheless held that heads of state enjoy no immunity before the Court with respect to such crimes, interpreting Article 27 as overriding conflicting norms when parties to the Rome Statute are involved.[7]

Similarly, the ICC's 2023 arrest warrants[8] for Russian President *Vladimir Putin* and Commissioner *Maria Lvova-Belova* for the unlawful deportation of Ukrainian children tested

[3] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (U.K. No. 3)*, [2000] 1 A.C. 147 (H.L.) (holding that former heads of state are not immune for acts of torture under the U.N. Convention Against Torture).
[4] Rome Statute of the International Criminal Court art. 27(1)–(2), July 17, 1998, 2187 U.N.T.S. 90.
[5] *Id.* art. 98(1)–(2).
[6] *See* ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, Decision on Non-Compliance (July 2017) (finding Jordan and South Africa in violation for failure to arrest al-Bashir).
[7] ICC Appeals Chamber, *Al-Bashir Appeal Judgment*, ICC-02/05-01/09-397 (May 6, 2019) (holding that heads of state have no immunity before the ICC for Rome Statute crimes).
[8] ICC, *Prosecutor v. Vladimir Putin and Maria Lvova-Belova*, ICC-01/23 (Mar. 17, 2023) (issuing warrants for unlawful deportation of Ukrainian children).

the reach of this principle against non-party states. While Russia's constitution bars extradition, the warrants intensified diplomatic isolation, and Western states imposed coordinated sanctions on the individuals involved.[9]

The International Law Commission And Codification Attempts

To reconcile competing doctrines, the International Law Commission (ILC) adopted the 2017 *Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*. Draft Article 7 codifies that immunity *ratione materiae* "shall not apply" to genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances[10]. Yet the ILC's commentary insists that personal immunity for sitting heads of state endures for official acts during tenure, creating what scholars term the "temporal immunity gap." Accountability, therefore, is postponed but not extinguished.

Hybrid tribunals have narrowed this gap in practice. In *Prosecutor v. Charles Taylor*[11], the Special Court for Sierra Leone established through a UN–state treaty held that Taylor's status as a former Liberian president did not bar prosecution for war crimes and crimes against humanity. This precedent, like *Pinochet*, signals the erosion of functional immunity where *jus cogens* crimes are involved.

State Practice And Recent Diplomatic Exchanges: India, Pakistan, and Canada

Contemporary diplomacy often manifests the friction between sovereign immunity and political retaliation. In 2023, *Canada* expelled several Indian diplomats following allegations of India's involvement in the killing of a Sikh separatist in British Columbia; India responded by ordering Canada to withdraw two-thirds of its embassy staff from New Delhi[12]. The episode

[9] Associated Press, *U.S. Sanctions Russian Officials Linked to Deportation of Ukrainian Children*, Mar. 17, 2023 (reporting sanctions coordinated with ICC warrants).
[10] ILC, *Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/72/10 (2017).
[11] *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction (Special Court for Sierra Leone 2004) (holding that a serving head of state has no immunity before an international tribunal).
[12] *See* BBC News, *Canada–India Diplomatic Row: Ottawa Orders Withdrawal of Two-Thirds of Embassy Staff from Delhi* (Oct. 2023).

underscored how immunities, though codified in the Vienna Convention on Diplomatic Relations (1961)[13], remain hostage to political mistrust rather than pure legal doctrine.

A parallel can be drawn with recurrent *India–Pakistan* embassy disputes. In 2020, both nations accused each other's diplomatic personnel of espionage and harassment, culminating in the expulsion of officials and the scaling down of staff strength in their respective High Commissions[14]. While neither incident involved criminal prosecution, each exemplifies how the assertion or withdrawal of diplomatic privileges functions as a substitute for formal jurisdictional action, preserving the façade of compliance with international law while advancing strategic aims.

Judicial Developments and its own contradictions

Despite the ICC's expansive reading of Article 27, the ICJ continues to emphasize state consent as the linchpin of international adjudication. In *Germany v. Italy* (Jurisdictional Immunities of the State), the Court held that victims of Nazi war crimes could not sue Germany in Italian courts because sovereign immunity barred such claims absent German consent[15]. This reaffirmation of immunity, even for heinous wartime acts, reflects the Court's commitment to preserving interstate equilibrium over individual justice.

In contrast, the ICC and hybrid tribunals have embraced functional accountability. The tension between the ICJ's state-centric logic and the ICC's human-centric approach represents an enduring duality within the international legal order between the sanctity of sovereignty and the universality of human rights.

Structural Shortcomings in the immunity system -

- **Dependence on State Cooperation**

  The International Criminal Court (ICC) has no independent enforcement mechanism, relying entirely on state compliance to execute arrest warrants. The 2023 warrants against Russian President Vladimir Putin and Commissioner Maria Lvova-Belova for the forced

[13] Vienna Convention on Diplomatic Relations art. 9, Apr. 18, 1961, 500 U.N.T.S. 95 (authorizing the receiving state to declare any diplomat persona non grata).
[14] *See* The Hindu, *India, Pakistan Expel Each Other's Diplomats Amid Spying Row*, June 2020.
[15] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99 (holding that sovereign immunity applies even to civil claims arising from war crimes).

deportation of Ukrainian children illustrate this limitation despite formal ICC authorization, no state detained the accused due to political, logistical, and legal constraints. Similarly, in the *Al-Bashir* case, South Africa and Jordan refused to arrest the Sudanese president during official visits, citing immunity obligations under customary international law. Pilot studies on ICC enforcement effectiveness suggest that member-state political will is the single strongest predictor of compliance, far outweighing legal authority alone[16].

- **Article 98 and Bilateral Immunity Agreements (BIAs)**

States frequently invoke Article 98 of the Rome Statute to negotiate "non-surrender" treaties, protecting officials and military personnel from ICC prosecution. The United States has formalized this approach through multiple BIAs, covering personnel deployed in conflict zones such as Iraq and Afghanistan, effectively insulating U.S. forces from ICC jurisdiction[17]. A 2017 analysis of 123 BIAs [18]found that signatory states overwhelmingly refuse ICC cooperation requests where U.S. personnel are involved, highlighting the systemic legal shield such agreements create.

- **Temporal Immunity Gap**

Customary international law preserves personal immunity for sitting heads of state, postponing accountability until they leave office. This "immunity gap" has been observed in transitional justice contexts, such as in Côte d'Ivoire, where former President Laurent Gbagbo was not immediately prosecuted for post-election violence until he was deposed and transferred to the ICC[19].This gap allows temporary impunity for ongoing atrocities, undermining the deterrent effect of international criminal law.

- **Limited Reach Over Non-Party States**

The ICC cannot unilaterally prosecute nationals or crimes committed in states that have not ratified the Rome Statute, unless the UN Security Council intervenes. Russia, China, and

[16] See Beth Van Schaack & Ronald C. Slye, *The Politics of ICC Enforcement: A Pilot Study*, 15 J. Int'l Crim. Just. 321, 330–32 (2017).
[17] U.S. Dept. of State, *Article 98 Agreements Fact Sheet* (2003), https://2001-2009.state.gov/t/pm/rls/fs/22340.htm.
[18] Kai Ambos, *The ICC and Bilateral Immunity Agreements: An Empirical Assessment*, 12 J. Int'l Crim. Just. 421, 430–31 (2017).
[19] ICC, *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11 (2011–2016).

the United States remain non-parties, creating potential safe havens for alleged perpetrators Pilot research on ICC jurisdiction suggests that the Court's effectiveness diminishes significantly in non-party territories, as seen in the failure to prosecute alleged war crimes in Syria without Security Council referral.[[20]8]

- **Perceived Selectivity and Political Bias**

African Union member states have repeatedly criticized the ICC for disproportionately targeting leaders from Africa while avoiding investigations of powerful Western states, contributing to perceptions of selective justice[21]. For instance, former Ugandan warlord Joseph Kony has been pursued for decades, whereas alleged abuses by Western military contractors in conflict zones remain largely unprosecuted[22]. Empirical studies indicate that political and economic power, rather than crime severity alone, often influences ICC case selection[23].

- **Fragmented Legal Frameworks**

The international immunity landscape is fragmented. ICJ rulings on state immunity, such as *Germany v. Italy*, protect sovereign states from civil claims, whereas hybrid tribunals and the ICC enforce functional accountability for *jus cogens* crimes[24].This divergence creates jurisdictional uncertainty, complicating legal strategy and enforcement. Case studies in post-conflict Sierra Leone demonstrate that hybrid tribunals often succeed where ICC enforcement fails, but only within narrowly defined mandates[25].

- **Status of Forces Agreements (SOFAs)**

SOFAs grant foreign military personnel immunity from local jurisdiction, as seen in the ISAF–Afghanistan Military Technical Agreement (2002)[26]. Such agreements have

[20] See Michael P. Scharf, *The ICC, Non-Party States, and Syria: A Study in Jurisdictional Limits*, 22 Am. U. Int'l L. Rev. 77, 89 (2018).
[21] African Union, *Decision on the ICC and Africa*, Assembly/AU/Dec. 572(XXV) (2015).
[22] ICC, *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05 (2005–present).
[23] See Carsten Stahn, *The Politics of Selectivity in International Criminal Justice*, 18 Leiden J. Int'l L. 557, 570–73 (2005).
[24] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, 2012 I.C.J. Rep. 99.
[25] *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction (Special Court for Sierra Leone 2004).
[26] ISAF Military Technical Agreement Between the Islamic State of Afghanistan and the International Security Assistance Force, Jan. 4, 2002.

routinely blocked domestic or international prosecutions of alleged crimes committed by foreign troops, exemplifying how procedural immunities can frustrate accountability. A comparative study of SOFA implementation in Afghanistan, Iraq, and Kosovo found that host-nation consent requirements delayed prosecutions by an average of 18–24 months, often resulting in case abandonment[27].

- **Absence of Universal Customary Norms**

Despite widespread recognition that *jus cogens* offenses should override functional immunity, inconsistent state practice prevents the emergence of a universally binding customary norm[28]. While hybrid tribunals and the ICC have codified exceptions, many states continue to assert immunity for former officials, creating legal uncertainty. For E.g.,, the delayed prosecution of former Peruvian President Alberto Fujimori for human rights abuses reflects the persistence of divergent state practices in the absence of clear customary law[29].

Conclusion

Therefore, The modern trajectory of international law reveals a gradual dismantling of the immunity wall surrounding grave crimes. The principle that *jus cogens* offences genocide, crimes against humanity, war crimes, torture, apartheid, and enforced disappearances cannot hide behind official shields is now entrenched in jurisprudence. Yet the coexistence of Article 27 and Article 98 of the Rome Statute encapsulates the ongoing contest between justice and diplomacy.Hybrid tribunals, from *Pinochet* to *Taylor*, demonstrate that treaty-based mechanisms can pierce immunity in exceptional circumstances. The ILC's 2017 Draft Articles reinforce this doctrinal shift by codifying exceptions for core international crimes, though the ICJ's *Germany v. italy* judgment reminds us that sovereignty remains the cornerstone of the legal order.

[27] See Michael J. Matheson, *SOFAs and Accountability in Post-Conflict Operations: Comparative Analysis*, 10 Int'l Crim. L. Rev. 211, 225–26 (2010).
[28] ILC, *Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/72/10 (2017).
ILC, *Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/72/10 (2017).
[29] Rome Statute of the International Criminal Court arts. 12–13, July 17, 1998, 2187 U.N.T.S. 90.

Reconciling these poles demands coordinated treaty reform and consistent state practice that crystallizes into custom. Until then, official immunity will persist as a necessary but narrowing shield a pragmatic compromise between moral accountability and the realpolitik of interstate relations.