

Conclusions

The objective of this thesis was to present the actual state of law on immunities that might be enjoyed by high state officials in international criminal law. The rule of individual criminal responsibility of these persons is deeply rooted in the system of international justice. From a historical perspective one can easily see how international criminal law has changed and is still changing. The whole process of constituting and gradually affirming imputability for international crimes to the highest agents of a state was commenced by the Nuremberg trial in 1945. Since then, the subsequently established *ad hoc* Tribunals, together with the finally created International Criminal Court have been dealing with many cases which involved state agents of various rank who committed international crimes. Thus, it is clear that the issue of immunities appears from time to time as an obstacle to prosecution and so the courts have to deal with this problem. This is also well-known to the scholars who comment on the judgements of the Tribunals and give opinion on the most controversial matters. Therefore, it seems to have been valuable to research this topic in more detail and discuss about the direction in which this part of international criminal law is heading.

The distinction between immunity *ratione materiae* and *ratione personae* is clear and explained in the legal doctrine well. International individual responsibility however has influenced the normal functioning of immunities. All theories claim that immunity *ratione materiae* has no rationale where international crimes are concerned and should therefore be disregarded. After a person has left an office, he or she is liable to be prosecuted when charged with the commission of a crime under international law. As far as personal immunity is concerned however, there is no definite practice of either the courts or the states depriving high state officials of it. At the moment, holding such a representative position successfully shields possible attempts of prosecution in general international law. Nevertheless, it seems justified to say that eventually even incumbent heads of state will be brought to justice and not merely on the basis of finally losing the status of a sitting official and so having only functional protection. It was only after the Second World War that individual criminal responsibility was established and since then the legal development in this field has been rather quick. For this reason, even if at this time it is not perhaps so obvious, one may argue that personal immunity will also be irrelevant in the future. The rationale for such an outcome is simple: without prosecution and forcible removal from office the crimes will continue to be

committed almost as if validated by the letter of law. The Bashir Case might be the breakthrough in this area. The current President of Sudan is charged with commission of a number international crimes and two arrest warrants have been issued for his surrender to the ICC – therefore it is only a matter of time until the international community will ensure his arrest. What is important to remember is that there are no international crimes which can be excluded from perpetration by means of holding a high position in the state apparatus.

What is visible in the current model of immunities in international criminal law is that both legal and institutional framework is well designed. From the legal point of view, all statutory instruments for the international tribunals have a provision about irrelevance of official immunity included in their norms. The prosecution initiated by these courts will not be barred by a claim of immunity because the rules in the relevant Statutes exclude this argument. Although the binding force of these documents differs, as the *ad hoc* Tribunals are supported by the United Nations and the ICC is an international separate entity, their meaning for the Member States is similar and they will always be bound by the norms provided in their statutory acts. Moreover, as was proven above, irrelevance of holding an official function where the commission of international crimes is concerned is considered to have acquired a customary law status unlike the norm awarding immunities itself. This means that from a hierarchical perspective immunities are much less important than both individual criminal responsibility and *ius cogens* norms. The latter are, for example, norms criminalising the conduct which amounts to international crimes. Following this reasoning, protection given to high state officials should not be taken into account.

Additionally, the institutional framework seems to be sufficient for the courts to administer justice in the cases in which a state representative is involved. The ICTY and the ICTR, notwithstanding the initial difficulties ensuring surrender of persons charged, have proven to be effective and eventually managed to obtain the necessary state cooperation. The ICC, as a distinctive international body acting only on the basis of its Statute, has drawn from the *ad hoc* Tribunals' experience and was given adequate powers to ask for its State-Parties' assistance. The Rome Statute entitles the Security Council to refer a situation to the ICC. This entails the usage of the measures provided for in Chapter VII of the UN Charter, through which an obligation to cooperate might be enforced on UN Member States who have not ratified the Statute of the Court. This somewhat circular way of achieving the main goals of the Court might not seem straight-forward, however it certainly creates some new possibilities to be discussed further.

On the other hand, although in theory the Court's success is supposed to be guaranteed, the practice is not as obvious. The case law is clear in its final outcome: judicial bodies hesitate when faced with a difficult and controversial case. Although they initially aim at establishing a precedent decision (e.g. by issuing arrest warrants for sitting heads of state), their further conduct is far from brave enough to launch new model of international criminal justice. At the same time, conservatism of the UN Security Council together with resistance from the side of some of its permanent Members who are motivated by political rather than legal aims, slows down the whole process. In this case, the common objective of restoring peace and convicting the perpetrators of international crimes is even more difficult to obtain. As a result the UN SC continues to issue resolutions which are more confusing than uncomplicated and cause uncertainty among the scholars. They attempt to resolve this complex situation by either supporting the actions of the Security Council or criticising them completely.

Whatever the future models of international criminal justice may be, there is a tendency that the law of immunities will evolve into a less important category of norms rather than assuring protection to the highest state officials who are sought to surrender to the international courts. It is, unfortunately, not possible to remove the political dimension from this scene. It is inherent in the characteristics of the function performed by these officials. Only time will show how the protection offered by immunities will change – whether it will be overridden by the growing need of the international community to punish international criminals who hold important state offices or not.