*Ismayil Mahmudov**

IMMUNITY AS A MAIN OBSTACLE ON THE WAY OF NATIONAL PROSECUTION OF INTERNATIONAL CRIMES

Abstract

The immunity of foreign high-rank state officials - heads of state, heads of government, and ministers of foreign affairs – is one of the main problems on the way of their national prosecution for committing of grave international crimes. This article is mainly dedicated to give an overview of the provisions about immunity of foreign high-rank state officials, which are stipulated in the decisions and Charters of Nuremberg and other tribunals, Rome statute, as well as decisions of national courts. The notion and types of immunities, analysis of various approaches, as well as the practice of international and national courts in determination of exceptions to the immunity of foreign high-rank state officials in national and international jurisdiction are researched.

Annotasiya

Xarici yüksək vəzifəli dövlət işçilərinin – ölkə başçılarının, hökumət başçılarının və xarici işlər nazirlərinin immuniteti onların ağır beynəlxalq cinayətlərin törədilməsinə görə milli məhkəmələrdə mühakimə olunması yolunda əsas maneədir. Bu məqalə xarici yüksək vəzifəli dövlət işçilərinin immuniteti ilə bağlı Nürnberq Tribunalının Nizamnamə və qərarları, Roma Statutu, həmçinin milli məhkəmə qərarlarında əks olunan tənzimləmələrin nəzərdən keçirilməsinə həsr olunur. Bununla yanaşı, immunitetin anlayışı və növləri, müxtəlif yanaşmaların təhlili, həmçinin xarici yüksək vəzifəli şəxslərin beynəlxalq və milli yurisdiksiyada immunitetindən istisnaların müəyyən olunmasında beynəlxalq və milli məhkəmələrin təcrübəsi araşdırılmışdır.

CONTENTS

* Baku State University, 2nd year LL.M. student in Transnational Criminal Law.

Introduction

In recent decades, the problem of bringing of foreign high-rank state officials to criminal responsibility for committing of international crimes on the basis of the principle of *universal jurisdiction*[1] attracts increased attention by the international community. This is largely due to the development of the institute for the protection of human rights, a decrease in tolerance to gross and massive violations of human rights that qualified as international crimes, which are committed under the command of high-rank state officials. However, the realization of responsibility of high-rank state officials for committing of such international crimes faces many problems, since the position of these officials makes them practically inaccessible to national justice in their states, and in accordance with international law, the state and some of its senior officials are immune in foreign courts. It is worth noting that international law recognizes the ability of national courts to use universal and extraterritorial jurisdiction in order to prosecute persons who have committed international crimes, but their implementation may be complicated by the political will of states and the unwillingness to hold their officials accountable. All this determines the importance of criminal prosecution carried out by international courts and national courts, which operate on the basis of the principle of universal jurisdiction and can bring foreign high-rank state officials to justice. This is where a conflict between the principle of individual criminal responsibility for international crimes and international immunities arises.

There is no doubt that the norm on the immunity of high-rank state officials from foreign criminal jurisdiction has a customary legal nature, i.e. the main source of international law in relation to the international legal immunity of foreign high-rank state officials is an international custom, and the specificity of its legal nature is determined by the rights of the states, which arise from their sovereignty and is based on the principle of equality of states. Thus, the International Court of Justice in the case concerning an arrest warrant (Democratic Republic of the Congo v. Belgium) of April 11, 2000, noted that the norms on immunity of high-rank state officials belong to customary international law.[2]

Currently, issues relating to the problem of immunity are dealt by the International Law Commission (hereinafter ILC) under the theme "Immunity of State officials from foreign criminal jurisdiction", and there is still no clear answer on a number of issues. According to the conclusion made by the ILC, international law gives immunity from criminal jurisdiction in a foreign

[1] *Universal jurisdiction* allows states to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity.

[2] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports, 62 (2002). Full text is available on www.icj-cij.org.

country to – the heads of states, heads of governments, and ministers of foreign affairs.[3] These officials as the "central bodies of external relations" enjoy immunity in accordance with the customary international norms.[4] However, a discussion of the topic of exceptions to the immunities showed a lack of consensus among members of the ILC. As a result, a number of issues arises: whether a state, on the basis of universal jurisdiction, is entitled to exercise its national criminal jurisdiction in relation to an accused foreign high-rank state official, which possesses an immunity? Commitment of which acts entails "overcoming" the immunity of high-rank state officials and creates opportunities for the prosecution of such officials? What are the exceptions to the immunity of foreign high-rank state officials?

I. Immunities of foreign high-rank state officials: *ratione personae* and *ratione materiae*

In the contemporary international law, *ratione personae* (personal) and *ratione materiae* (functional) immunities of foreign high-rank state officials from criminal prosecution in national courts are distinguished.

Immunity *ratione personae* (personal immunity) is "the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations".[5] Immunity *ratione personae* is granted to a limited circle of high-rank state officials – the heads of state, heads of governments and ministers of foreign affairs of foreign states, whose freedom of action plays the most significant role for the functioning of states.[6] It results from the position of the official, which he/she occupies in the public service and, naturally, from the state functions that the official must perform in connection with the position that he/she occupies. According to article 31 of the Vienna Convention on Diplomatic Relations, this immunity from foreign criminal jurisdiction is granted to officials, which hold senior government positions, and they are accredited as diplomatic agents in the host state.[7] Immunity *ratione personae* applies to all actions of the official, regardless of whether they were carried out in connection with his/her official duties and regardless of whether he/she

[3] Preliminary Report of the Special Rapporteur, Mr. Roman Anatolevich Kolodkin, 60th session of the ILC, 185 (2008). Full text is available on http://legal.un.org/ilc/documentation/english/a_cn4_601.pdf

[4] Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Court,* 21 The European Journal of International Law 815, 822 (2011).

[5] Second Report of the Special Rapporteur, Ms. Concepción Escobar Hernández, 65th session of the ILC, 50 (2013). Full text is available on http://legal.un.org/docs/?path=../ilc/reports/2013/english/chp5.pdf&lang=EFSRAC

[6] *Supra* note 4, 821.

[7] Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961.

held a public office at the time of committing of such actions.[8] Due to the close relationship with the official`s position in the public service, it is temporary in nature, and arises with the entry into office and stops when the person ceases to hold it.

Immunity *ratione materiae* (functional immunity) is "the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".[9] All acting and former officials enjoy functional immunity. They possess it, since these actions are the actions of the state itself, in whose service they act. This type of immunity extends to all official actions performed on behalf of the state, in the performance of his/her official duties, it does not cover actions committed in a personal capacity, and it is not affected with a nature of being abroad: with an official visit or in a personal capacity. After the official stops to hold a public office, he/she continues to enjoy immunity *ratione materiae* in respect of acts performed in an official capacity.

Thus, the heads of state, heads of governments and ministers of foreign affairs of foreign states are protected both by immunity *ratione personae* and *ratione materiae*. This conclusion follows from the customary norms of international law, confirmed by decisions of international courts and state practice.[10] It is worth noting that the important difference between *ratione personae* and *ratione materiae* is the presence of circumstances excluding their action: exclusions exist in relation to functional immunity, and are practically absent in respect of personal immunity. One of the grounds for depriving an official from functional immunity is the commitment international crimes.

II. International jurisdiction and immunity of foreign high-rank state officials

While the principle of the inapplicability of immunities of high-rank state officials operates in international jurisdiction, the issue of exclusions to their immunities in national jurisdictions is debatable. The ILC has not yet begun to consider the issue of exceptions to immunities. Therefore, in order to find an answer to the issue of exceptions to the immunities of high-rank state officials of foreign states in national jurisdiction, we will consider their prosecution for committing of international crimes by international courts, that is, in international jurisdiction.

The cornerstone in the history of the doctrine of absolute immunity of heads of state was the prosecution of the main war criminals after the World

[8] *Supra* note 5, 52.
[9] *Supra* note 5, 50.
[10] Евдокимова О.Н., *Исключения из Иммунитетов Должностных Лиц Государства от Международной и Национальной Уголовной Юрисдикции*, 7 Вопросы Российского и Международного Права 272, 279 (2017).

War II. For the first time, the principle of inadmissibility of references to official position was enshrined in article 7 of the Charter of International Military Tribunal for the trial and punishment of the main war criminals on the European countries axis of 1945, as well as in the Nuremberg principles, adopted at the second session of the ILC in 1950, having the character of *jus cogens*[11]. In article 7 of the Charter of International Military Tribunal was written that "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."[12] The judgment of Nuremberg tribunal emphasized: "... the principle of international law, which under certain circumstances protects a state representative, cannot be applied to actions that are condemned as criminal under international law. The perpetrators of these actions cannot hide behind their official position to avoid punishment in a proper order."[13] Similar provisions were included in the Statute of Tokyo tribunal and mentioned in its judgment.

So, in the framework of Nuremberg process, Admiral Karl Doenitz, who became a head of state after Hitler's death, appeared before the court, and during the Tokyo process four former prime ministers and eleven former ministers were brought to justice, although the Emperor of Japan, Hirohito, was not prosecuted.

After Nuremberg and Tokyo tribunals, the development of the proclaimed exception to the rule on the absolute immunity of state representatives was continued only in 1993 with the establishment of the international ad hoc tribunals for the former Yugoslavia and Rwanda. The Statutes of these tribunals stipulated that "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."[14] Thus, the International Criminal Tribunal for the Former Yugoslavia in 2000 signed an indictment against S. Milosevic, who at that time still served as a President of the former Republic of Yugoslavia and who was accused of genocide of Bosnian Muslims in Srebrenica, crimes against humanity and war crimes. Although S. Milosevic never became the first acting head of state in history who was prosecuted for international crimes, as he died in prison just before a sentencing by court.

For the first time since the Nuremberg Tribunal, the conviction of the former head of state was passed on May 30, 2012 by a special court in Sierra Leone. In accordance with the sentence of the Special Court for Sierra Leone,

[11] *Jus cogens* (from Latin: compelling law; from English: peremptory norm) refers to certain fundamental, overriding principles of international law.
[12] Charter of the International Military Tribunal, article 7, August 8, 1945.
[13] International Military Tribunal (Nuremberg), Judgment (1 October 1946), 14. Full text is available on https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf
[14] Statute of the International Criminal Tribunal for the Former Yugoslavia, article 7.2, May 25, 1993.

former President of Liberia Charles Taylor was convicted of committing of international war crimes in the neighboring state of Sierra Leone during the civil war of 1991-1997 and was sentenced to 50 years imprisonment.[15]

In recent history, the impetus to the development of concept and exceptions to the doctrine of absolute immunity of heads of state was adoption of the Rome Statute. Article 27 of the Rome Statute, which established the International Criminal Court, directly enshrines the principle of irrelevance of *ratione materiae* (functional) and *ratione personae* (personal) immunities in the criminal prosecution in accordance with this Statute: "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. 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".[16]

Article 27 of the Rome Statute should be considered in conjunction with the norms, governing the interaction of states parties to the Statute and the International Criminal Court, in particular, in conjunction with part 1 of article 98 of the Statute: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."[17] So, taking into account part 1 of article 98 of the Statute, the International Criminal Court is authorized to prosecute high-rank state officials of the state parties to the Rome Statute, and only if the accused is an official, endowed with international immunity by the "third state", the Court is obliged to obtain the consent of that state.

Thus, from all the above-mentioned we can deduct the following conclusion: international law has established the principle, according to which immunities do not prevent international criminal courts to hold high-rank state officials individually responsible for committing of international crimes. So, the myth of absolute protection of high-rank state officials, arising from absolute immunity, was eliminated.

[15] War Criminal Charles Taylor to Serve 50-year Sentence in British Prison, (October 10, 2013). https://www.theguardian.com/world/2013/oct/10/former-liberian-president-charles-taylor-british-prison (last visited October 31, 2018).
[16] Rome Statute of the International Criminal Court, article 27, July 17, 1998.
[17] *Id.* article 98.1.

III. National jurisdiction and immunity of foreign high-rank state officials

The immunities of officials of a given state and immunities of officials of foreign states should be differentiated.

The Criminal Code of the Republic of Azerbaijan does not contain as a principle the inadmissibility of reference to official position. Moreover, it does not contain a norm, fixing the inapplicability of immunities related to the official status of a person (the head of state, head of government, etc.). However, the absence of a norm on the immunities of officials in the Criminal Code of the Republic of Azerbaijan is compensated by the provisions of the Constitution of the Republic of Azerbaijan. So, the principle of equality of all before the law and the court is enshrined in article 25 of the Constitution: "1. All are equal before the law and the court. 3. The state guarantees the equality of the rights and freedoms of everyone, regardless of race, nationality, religion, language, gender, origin, property status, *official position*, belief, membership in political parties, trade unions and other public associations."[18] As we see from this provision, the official position is not the basis for the differentiation of rights and freedoms. Article 6 "The principle of equality of citizens before the law" of the Criminal Code of the Republic of Azerbaijan states that "persons who have committed crimes are equal before the law and are subject to criminal responsibility regardless of race, nationality, attitude to religion, language, gender, origin, property and *official status*, beliefs, affiliation to political parties, trade unions and other public associations, as well as other circumstances."[19]

Thus, the constitutional provisions relating to immunity, as well as article 6 of the Criminal Code of the Republic of Azerbaijan does not mean complete freedom and impunity of the actions of high-ranking state officials in case of committing of an international crime. The Constitution of the Republic of Azerbaijan designates persons who are immune from criminal prosecution, namely: The President (art. 106), Vice-President (art. 106^1), member of Milli Mejlis (art. 90), judges (art. 128). However, there are special procedures that regulate "lifting" of their immunities: in the case of impeachment of the President (on charges of serious crimes) - art. 107 of the Constitution of the Republic of Azerbaijan; for deputies who have immunities only in respect of crimes committed in the course of their activities as members of parliament - art. 90 of the Constitution of the Republic of Azerbaijan, etc.[20] Consequently, the presence of immunities under domestic law is not an obstacle to hold officials accountable: in case of need for bringing them to justice, a procedure of "lifting" of immunity can be initiated.

[18] The Republic of Azerbaijan Const. art. 25 (1995).
[19] Criminal Code of Republic of Azerbaijan art. 6 (1999).
[20] *Supra* note 18, art. 90 and 107.

The prosecution of foreign high-rank state officials for the committing of international crimes by national courts is more complex, since the criminal prosecution of foreign high-rank state officials by national courts of other states is greatly influenced by politics and not law, which makes such prosecution rare, but it does not make it impossible. Nevertheless, even abstracting from the political background of such processes, from a purely legal point of view, the criminal prosecution of foreign high-rank state officials by national courts is greatly hampered by the action of international immunities, this is confirmed by the practice of national and international courts.

The trial in Great Britain of former Chilean dictator general A. Pinochet became an example for initiating prosecution in national courts against high-rank state officials of foreign countries. Spain, where the criminal prosecution of A. Pinochet was initiated on charges of murdering Spanish citizens in Chile, issued an international arrest warrant. On the basis of this warrant in 1998, the former dictator, who was visiting London, was arrested by the London police on charges of torture of Spanish citizens and conspiracy to commit it. Preparations were commenced for the extradition of A. Pinochet to Spain on the basis of the European Convention on Extradition. When the case was examined in a number of instances, the issue of the immunity of the ex-dictator was central (including the House of Lords).[21] A number of judges recognized that the institution of immunity of high-rank state officials does not cover grave international crimes: committing such acts contrary to *jus cogens* norms and their commitment is condemned by all countries as crime, and therefore A. Pinochet cannot be protected by international norms on immunity for acts performed in an official capacity. The final conclusion in A. Pinochet case was that the former head of state`s immunity does not prevent his/her extradition, but because of A. Pinochet`s illness, he was not extradited to Spain.

Despite the fact that the process in Spain did not take place and the dictator was not convicted, this case represents the very first case when the former head of state appeared before the national court of other state and the case of violation of international law was considered. Moreover, it was a first time, when it was recognized that the former head of a foreign state does not have immunity *ratione materiae* (functional immunity) in respect of acts prohibited by international law. However, the House of Lords in its decision did not clarify what happened to the traditional doctrine of the immunities of heads of state and whether it was finally replaced by the customary international norms introducing a new, more limited concept that denies immunity in case of committing of international crimes. The decision of the House of Lords in

[21] U.K. House of Lords: Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet (No. 3), All England Reports, 97 (1999).

A. Pinochet case was of a paramount importance for international law: it became the starting point for initiating criminal cases in other states, and all subsequent attempts to bring high-rank state officials to justice in one way or another were based on this decision. A number of proceedings were initiated in various states against former and acting heads of state on charges of committing international crimes. Thus, it is worth noting Lord Millet`s opinion in A. Pinochet case: "The international community has established a crime against which immunity *ratione materiae* (functional immunity) cannot be applied. It cannot be assumed that international law established a crime as a norm, bearing the character of general international law (*jus cogens*), and at the same time provided for immunity, applicable equally to the obligation it imposes."[22]

Another example is the decision of the Israeli Supreme Court in Eichmann case. The Supreme Court rejected Eichmann's reference to "state action", and the Court indicated that this argument cannot be applied to crimes under international law. The court ruled: "It is necessary to say about such atrocities that, in accordance with international law, they absolutely go beyond the "sovereign" jurisdiction of the state that ordered to commit them or approved their committing, and therefore those, who participated in such acts should bear personal responsibility and cannot hide behind the official nature of their task or mission, or the "laws" of the state on the basis of which they acted."[23] Their position can be compared to the position of a person who, having committed a crime in the interests of the corporation he/she represents, cannot hide behind the collective responsibility of the corporation for this crime. In other words, international law establishes the inadmissibility of a state sanctioning an action that violates the strict prohibitions provided for in international law, and from this follows the principle forming an essence of the concept of "international crime", according to which a person who participated in committing of such a crime must be brought individually accountable for its committing. If it were otherwise, the criminal-legal norms of international law would be a mockery. This position confirms that, in national practice, immunity *ratione materiae* (functional immunity) does not apply to international crimes.

We should agree with the position of S.V. Glotova, according to which: "The obligations of states to punish grave crimes are *erga omnes obligations*[24], which are a consequence of the concept of *jus cogens*."[25] Consequently, some

[22] *Id.* 99.

[23] Attorney - General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, 277 (1968).

[24] *Erga omnes* (Latin: "towards all") *obligations*, which apply to all states. Whereas in ordinary obligations the defaulting state bears responsibility towards particular interested state, in the breach of *erga omnes obligations*, all states have an interest and may take appropriate actions in response.

[25] Глотова С.В. *Юридические Предпосылки Применения Норм Международного Права в Российской Правовой Системе (на примере уголовной ответственности за преступления по*

lawyers point out that such obligations are the legal basis for concluding that the committing of international crimes constitutes an exception to immunity *ratione materiae* (functional immunity).

Nevertheless, not in all cases, former heads of state are held criminally responsible in foreign countries. Among the trials of the acting heads of state initiated in foreign states, we can mention the trial of Muammar al-Gaddafi. The trial against the Libyan leader Muammar al Gaddafi lasted from October 1999 to March 2001 in France. By that time, Muammar al Gaddafi actually remained the acting head of state, although he changed his post of president of the General People's Congress to the title of "leader of the great revolution on September 1". After the commencement of the process in the court of first instance, the prosecutor filed a complaint with the appellate court, referring to the fact that Gaddafi has immunity and, therefore, he is not subject to criminal prosecution. The Court of Appeal, in its decision of October 20, 2000, concluded that persons accused of committing international crimes do not enjoy international immunity. However, the French Supreme Court overturned this decision on the ground that no matter how serious the violation of international law was, no exceptions can be made to the immunity of the acting head of state.[26]

Another interesting decision was adopted by the International Court of Justice. So, on April 11, 2000, a Belgian judge issued an international arrest warrant in absentia against the acting minister of foreign affairs of Congo, A. Y. Ndombasi, who was accused of committing international crimes. On October 17, 2000, Congo filed a statement with the International Court of Justice, in which it accused Belgium of violating international law, because by issuing an arrest warrant for the minister, Belgium violated the Congolese official's immunity, and wrongfully initiated the prosecution in absentia on the basis of principle of universal jurisdiction.

Considering this case, the International Court of Justice concluded that the acting minister of foreign affairs is immune from criminal prosecution by foreign courts and cannot be held criminally responsible, even though he is accused of committing international crimes such as, in this case, war crimes or crimes against humanity. In particular, the Court points out that the study of the practice of states, including national legislation and decisions of the supreme courts of some states, does not allow us to deduce the rule about the absence of international immunity for acting heads of state. In addition, from the provisions of the Charters of international courts, as well as their decisions on immunities or official status, it cannot be inferred that the immunities of high-rank state officials do not function in the case of prosecution of such

международному праву), 6 Российский Юридический Журнал 7, 15 (2015).

[26] France will not prosecute Gaddafi, (March 13, 2001). http://news.bbc.co.uk/2/hi/europe/1218245.stm (last visited October 31, 2018).

persons by national courts. The Court also indicated that the courts of foreign states may bring such persons to criminal responsibility if the state they represent decides to deprive them from their immunity, or if the person leaves the relevant post, it can be brought to justice for "acts committed before or after being in relevant position, as well as for acts committed in a private capacity during the term of office."[27] In particular, the Court expressed an extremely minimalist approach towards customary norms on exceptions to immunities in international law (referring to the Nuremberg Principles, UN GA resolutions, article 4 of the Genocide Convention, NGO reports and court decisions). Thus, the International Court of Justice expressed support for the action in international law of the immunity of high-rank state officials, even in the case of accusing them of committing international crimes. Moreover, according to the Court`s point of view, criminal prosecution is hampered not only by the immunity *ratione personae* (personal immunity), which is granted to acting high-rank state officials, but also by the immunity *ratione materiae* (functional immunity) of former state leaders for actions performed in an official capacity. However, a detailed study of the arguments of the parties, as well as other circumstances allows us to reasonably disagree with the opinion of the distinguished Court. So, this court decision was subjected to sharp criticism not only in the literature, but also from a number of judges of this court.

The decision of the International Court of Justice on the arrest warrant practically ignores all previous development of international criminal law, since the provision that an individual cannot "hide" behind a state constitutes the very essence of the principle of individual criminal responsibility. Historically, the assertion in international law of the principle of individual criminal responsibility for significant violations of international law took place, simultaneously, with the waiver of immunities for such violations. In fact, the committing of international crimes would not have been possible if there was no participation of high-rank state officials, since they develop plans and give orders, therefore such persons should have greater responsibility than subordinates who directly committed the acts. It would be a paradox to punish only the performers, protecting the organizers from criminal responsibility.

The Rome statute, which established the International Criminal Court to prosecute crimes against humanity, genocide, war crimes and crimes of aggression, enshrined the principle of non-application of immunities on high-rank state officials under both national and international law.[28] This raises the following issues: Does this norm only apply if the prosecution is carried out

[27] *Supra* note 2, 3.
[28] Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 The American Journal of International Law 22, 35 (1999).

by the International Criminal Court, i.e. in a "vertical relationship", or do the states parties to the Rome statute also have to or can, by adopting appropriate legislation, refer to this provision when implementing criminal prosecution at the national level, i.e. in "horizontal relations"? There is a view that according to the Rome statute, on the basis of the principle of complementarity, priority is given to national courts in prosecuting international crimes and, as a result, they are "forced" to criminalize these crimes and prosecute the perpetrators, so far that participating states can act without looking back on international immunities. Another point of view is based on the literal interpretation of article 27 and article 98 of the Statute, according to which immunities are not valid only in the framework of prosecution carried out by the International Criminal Court.[29] It turns out that the states parties to the Statute will not be able to bring to justice the high-rank state official suspected of committing an international crime, but then the International Criminal Court will enter the matter. Most scholars advocate the correctness of such an interpretation of the Rome statute, believing that only it complies with customary international law.

Some states have already adopted legal acts on the implementation of the Rome statute, and it can be traced how they address the issue of the effect of immunities. Some part of states directly enshrined the effect of immunity *ratione personae* (personal immunity), the other part of states enshrined the rule that international immunities should not interfere with the prosecution of international crimes. However, the majority of states decided not to address this issue in the relevant acts. Thus, the states parties to the Rome statute, which have already implemented this international treaty, have taken a restrained position regarding the waiver of immunities in the prosecution of international crimes.

Conclusion

Despite the persuasiveness and consistency of the above arguments, we must not forget that the goal of granting international immunity to high-rank state officials is not only to ensure the sovereign equality of states and to guarantee non-interference of some states in the affairs of other states, but also to ensure normal and effective interstate communication. If one imagines that the national courts of separate states could, without regard to immunity *ratione personae*, bring to justice the acting heads of state, heads of government, and also the key ministers of other states, then a situation would arise when these individuals were actually restricted in their movement and the exercise of their powers. Moreover, consensus rarely reigns in international relations: sometimes different states give the opposite assessment of the same event.

[29] Cassese A., Gaeta P., Jones J.R.W.D, *The Rome Statute of the International Criminal Court: A Commentary*, 1 Oxford University Press, 1871-1875 (2002).

Therefore, if we admit the lack of immunity *ratione personae* of high-rank state officials, there would be an opportunity for a clear abuse of the right to bring high-rank representatives of other states to responsibility. It follows that bringing to justice the acting high-rank state officials, at least at this stage of development of the international community, would violate the existing stability in international relations of states.[30] Therefore, it will be fair to recognize the effect of international immunities *ratione personae* on this category of persons even if they are accused of committing international crimes. At the same time, all of the above mentioned are in no way related to the prosecution of former high-rank state officials: the granting of international immunity to them does not meet the stated goals of this institution. It follows that the responsibility of such persons for international crimes must be imposed, despite immunity *ratione materiae*.

Thus, up to the present moment in history there have not yet been any cases in which the acting head of state or other high-rank state officials were prosecuted for international crimes by foreign courts. In international law, there is no international custom about the priority of individual responsibility of high-rank state officials for committing of international crimes over international immunities *ratione personae* in the case when the prosecution occurs at the national level. At the same time, modern international law is based on the legality of the prosecution by national courts of former high-rank state officials of foreign countries, that is, immunity *ratione materiae* has lost its force. Summarizing all the above, it can be concluded that the ratio of the principle of individual criminal responsibility and international immunities varies depending on which courts, national or international, carry out the criminal prosecution.

The current situation can be potentially changed by practice of the states that ratified the Rome statute by the way of introduction of norms, regarding non-application of immunities to the high-rank state officials in the national legislation in case of conducting criminal prosecution for international crimes. But so far this trend has not yet emerged. Nevertheless, it is impossible to talk about the complete impunity of high-rank criminals, because the principle of individual criminal responsibility prevails over international immunities in the implementation of prosecution at the international level, and at the national level the *ratione materiae* immunity of former heads of state have lost their force.

[30] Cassese A., *When May Senior State Officials Be Tried for International Crimes? Some Comments on Congo v. Belgium Case,* 13 European Journal of International Law 853, 873 (2002).