

**BABEȘ-BOLYAI UNIVERSITY, CLUJ-NAPOCA
FACULTY OF LAW**

**HEAD OF STATE IMMUNITY
IN CRIMINAL LAW**

- Ph. D. Thesis Abstract -

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KEYWORDS

Head of state. National law. International law. Domestic courts. International courts. International criminal tribunals. Hybrid courts. Mixt courts. International law immunity. Domestic immunity. Substantive law immunity (*rationa materiae* immunity). Inviolability (*rationa materiae* immunity). Functional immunity. Absolute immunity. Nicolae Ceaușescu. Ion Iliescu. Traian Băsescu. Constitutional Court. Political responsibility. Legal liability. Criminal liability. Civil liability. Contravention liability. Chirac. Pétain. The Gaddafi case. The Kabila case. The French Constitution of 1958. Spain. Belgium. The Honecker case. The Krenz case. Italy. The Cossiga case. Great Britain. The Burrell case. United States of America. United States Supreme Court. *Impeachment*. The Johnson case. The Nixon case. The Clinton case. Alberto Fujimori. Frederick Chiluba. Augusto Pinochet. Former head of state. International law crimes. Torture. International Military Tribunal from Nuremberg. The International Military Tribunal for Far East from Tokyo. The European Court of Human Rights. The International Criminal Tribunal for Rwanda. Jean Kambanda. The International Criminal Tribunal for Former Yugoslavia. The Milošević case. The Milutinović case. Individual criminal responsibility. Responsibility of the superior. Sitting head of state. International Court of Justice. The *Congo vs. Belgium* case. Official acts. Private acts. Customary law. Irrelevance of official capacity. “The liberty to instruct”. The *Djibouti vs. France* case. *The Republic of Congo vs. France* case. Special Court for Sierra Leone. Charles Taylor. Liberia. Legitimacy. Preliminary motion. High Tribunal for Iraq. Saddam Hussein. Al Dujail. Domestic internationalized courts. International Criminal Court. The Al Bashir case. The Gaddafi case. Article 27 from the Rome Statute. Article 28 from the Rome Statute. Security Council. United Nations Charter. Chapter VII from the United Nations Charter. Hissene Habré. The International Court of Justice versus the Court of Justice of The Economic Community Of West African States.

ABSTRACT

The present study has the purpose of presenting in great detail the institution of head of state immunity in the Romanian law, in the comparative law and – most important – in the international law.

The subject's thesis, although of great novelty for the Romanian literature, has been heavily researched in the foreign doctrine. Therefore, trying to be somehow different in the perspective, the analysis was from the starting point set around a permanent dichotomy between case law and doctrine. Thus, each institution, each concept and theoretical element has been the object of an in-depth analysis always in connection with at least one relevant case from the jurisprudence.

In the end, without wanting it to be a more or less complete compendium of all cases involving the liability and immunity of the head of state in domestic and international law, this study presents in a complex manner – and always focusing on case law aspects - the way the institution of head of state immunity evolved until the end of the XXIst century, more precise the end of August, 2011.

1. Taking into the topic of the study – which can surprise due to the numerous novelty elements -, as well as the large amount of information which can induce a kind of confusion or become tiring, a first section of the thesis is dedicated to certain *preliminary aspects*. Within this first section, dealing mostly with formal aspects, rather than substance ones, the general framework of the future analysis is sketched, therefore identifying the landmark- elements of the study.

2. Thus, the notion of head of state in international and national law is presented, stressing out the limits of the analysis; in the follow up, a general presentation of the immunity institution is realised, underlying, more particularly, on head of state immunity. In the same context, it is drawn a short history of the head of state immunity institution: starting from customary law and until the provisions of the 1961 Vienna Convention, the first cracks in the impunity of the head of state immunity in both domestic an international law are identified, thus starting on towards contemporary law.

In the end, it is done a systematization of the subject, starting from the major classification of domestic law immunity and international law immunity and correspondently, domestic courts and international and hybrid courts.

3. Having in mind all these classifications, actual landmarks of the thesis, the analysis is al well determined in two distinct parts, entitled *Head of state immunity before criminal domestic courts* and

Head of state immunity before international criminal tribunals. The analysis will focus on the particularities of the institution and the mechanisms of its functioning in the Romanian law, in the comparative law and in international law, both before domestic and international courts.

All these clarifications regarding the systematization of the subject have been done with the sole purpose of avoiding tiring repetition and in order to convince on the option of using such a non-orthodox manner of systematization. Even more, the arguments which stand behind the choice of not analyzing certain aspects, although these might appear closely connected with our topic, will be understand.

4. The first part of the thesis – entitled, *Head of state immunity before criminal domestic courts*, starts off with a complex analysis of the immunity institution in the Romanian system.

After the domestic law rationales of the immunity in general and of head of state in particularly are presented, the analysis is focusing on the definition of immunity, as it is to be found in the Constitutional law doctrine, the Criminal law doctrine and, especially, in the case law of the. The utility and rationale of such a definition are closely examined.

In the follow up, the study deals with the major classification of immunity: international law and domestic law immunity, functional and absolute (extra functional) immunity, substantive law immunity and procedural immunity. When dealing with substantive law immunity and procedural one, the legal nature of each one it is closely examined, the solutions proposed by the authorities when encountering one of these immunities, as well as the legal ground for these solutions.

5. The next section concentrates on historical aspects: the evolution of the institution from the 1833-1832 period of the Organic Regulations until the revised form of the 2003 Romanian Constitution. Among all the aspects related to the “constitutional life” in Romania, the 1965 Constitution is underlined, as well the “trial” of Nicolae Ceaușescu, from December of 1989.

6. When dealing with the provisions of the nowadays Constitution, it is made a comparative presentation between the 1991 version and the 2003 one; afterwards, a close scrutiny of the provision of article 84 para. (2) from the Constitution is made. Focusing on the first thesis of article 84 para. (2), the analysis draws attention on the procedural immunity. Thus, it is identified its absolute character; then the sphere of protection is researched both from the perspective of crimes and procedural measure and the temporal limitations. Afterwards, dealing with the second thesis of article 84 para. (2), the substantive law immunity is presented. Numerous arguments are brought, in order to support the functional character of the above mentioned institution: only official acts fall under the protection of this immunity, but its protection will last in time even after the cease of the presidential mandate. Due

to the functional character of the substantive law immunity, all the presidential functions are closely examined and some controversial problems from the reality of the last years are presented – granting or revoking individual pardon, opinion of the president expressed in non-official frame etc.

7. Once the presidential immunity, its various forms and domain of applicability were established, the analysis moves on with the problem of the president's liability. After some initial clarifications about political or juridical liability, the attention concentrates on the political liability: the procedure of suspension is examined, as well as its consequences and the incidence of immunity.

From the point of view of criminal liability, the impeachment procedure is closely presented. First, the meaning of the notion "high treason" is explained, second, the exceptions from immunity are identified and afterwards, the procedure of impeachment, the duration of suspension and the final judgment of the Supreme Court are all scrutinized.

In the end, although not part of the specific topic of the study, attention is drawn on some aspects regarding the civil and contravention law liability of the president.

8. The next chapter from the first part deals with the subject of head of state immunity in comparative and international law, in the case law of national courts. Starting from the landmark – element of a domestic court being the forum involved, the analysis follows the immunity of head of state in comparative law, focusing on the major legal systems, as well as on the way in which these courts have applied international law dispositions in cases of foreign head of states.

9. Therefore, a first section is dedicated to Europe and the United States of America.

10. First of all, the French system is examined, starting from the 1958 Constitution and its dispositions on head of state liability and immunity and until the modifications from 2007. Besides the legal text analysis, the trial against the then sitting president Chirac is examined, this being the first trial against a head of state in France, since the trial against Pétain and the trial that was the factor behind the 2007 modification of the French Constitution. From the perspective of international law, the case law of the French courts is presented in the cases of Gaddafi and Kabila.

11. In the next section, following the above mentioned pattern, the constitutional provision dealing with head of state immunity in monarchies is presented, namely, Belgium and Spain. Besides the legal text analysis, relevant aspects of the application and interpretation of international law aspects in the case law of Belgian and Spanish courts are underlined.

12. The study continues with another exponential system from the European continental law system, Germany. The relevant legal provisions from the German Constitution are in-depth analysed,

through a permanent connection with cases from the jurisprudence of the German constitutional courts, namely, the Honecker and Krenz trials.

From the perspective of the foreign head of state immunity in the case law of the German courts, the focus is on the Honecker, Saddam Hussein, Videla and Jiang Zemin cases.

13. Eventually, the last European continental law system presented is the Italian one. After the study of the provisions of article 90 from the Italian Constitution, the existence and extend of the substantive law immunity and of the controversial procedural immunity are determined. In the end, it is scrutinized the modality through which the Italian jurisprudence has applied the so-called *constitutional fair-play*, as proposed by the doctrine.

14. In the follow up, the analysis moves on to some of the most important *common law* systems, namely Great Britain and the United States of America. After an overview o the particularities of the *common law* system versus the continental one in general and, more specifically with regard to head of state immunity, the statute of the sovereign on the domestic level in Great Britain is presented. The controversial aspects surrounding the Burrell case are underlined in order to reach some conclusion regarding the immunity of the Queen.

15. In the context of the American system, the analysis primarily focuses on the case law of the Supreme Court and its conclusions in the Johnson, Nixon and Clinton cases. A detail research is dedicated to the *impeachment* procedure, as well as to the impeachable crimes and the connection between the constitutional procedure and usual one.

In the end, due to the numerous cases involving foreign head of state immunity in international law before American courts, a special section is dedicated strictly to the study of this delicate issue.

16. Moving on to Latin American, the study is structured according to the type of crimes the sitting or former head of states were charged with: human rights violation or corruption and related crimes. The case of Alberto Fujimori – due to its complexity and to the well known figure of the defendant – has been chosen as the landmark element from the case law perspective, having the advantage of verifying the incidence of immunity in both cases of charges.

17. The last part of this chapter is dedicated to Africa and Asia: the study is trying to establish some common elements and eventually focuses on the trial of Frederick Chiluba.

18. The last chapter from the first part of the thesis is dedicated to the so-called “Pinochet jurisprudence”, covering all the judicial saga which had in the spotlight the implacable former Chilean

dictator Augusto Pinochet and involved courts from Spain, Belgium, France, Italy and, especially, Chile and Great Britain.

Thus, starting off the charges on gross human rights violations, already recognized as international law crimes, the Spanish authorities have started the trial against the former dictator, now a senator for life in Chile. Encouraged by the lethargy of the Chilean justice and by the advantage created by the fact that Pinochet was in England for some medical treatment, the Spanish authorities have demanded the extradition of Pinochet. This was the starting point of perhaps the most important trial ever involving a former head of state charged with committing international law crimes, a trial that was soon before the House of Lords – the highest court in Great Britain – and established for the first time conclusions on the existence and extend of the head of state immunity.

Besides the legal aspects that might have influenced the outcome of the case, blocking the extradition and the prosecution of Pinochet in Spain, eventually prosecuted in Chile, the trial before the English courts has consecrated, with precedent authority, some conclusions at the international law level. Among these, we mention: the recognition of sitting head of state procedural immunity, the rejection of the idea that international law crimes can be committed in an official capacity, the possibility of prosecuting a former head of state by a domestic court other than the national one of the defendant, and last but not least, at a general level, the primacy of international law over domestic one.

19. Once the conclusions of the English courts regarding the immunity of a former head of state in international law have been underlined, the study proposes an alternative and opposite solution: the deferral of high rank defendant to the international judicial forums, especially created for such purposes (following the pattern of the *ad hoc* tribunals) or already existent (at the present hour, the International Criminal Court), if these court have jurisdiction.

Such a solution has apparently and at least in theory only advantages: making high quality justice, avoiding the interference of the political factor, the lack of admissibility of domestic law procedural exceptions and, of utmost importance, the lack of relevance of official capacity.

The theoretical advantages proposed by such a solution make the object of analysis of the second part of the study, entitled *Head of state immunity before international criminal tribunals*, when all the legal provision and the doctrinal approaches will be verified from a practical perspective.

20. The first chapter from the second part is dedicated to some preliminary aspects, trying to familiarize the reader with the mechanism of international criminal tribunals and presenting some of

the most important courts that fall in this category, anticipating the connection with the subject of head of state immunity.

In the same context, with the risk of making some digression, the arguments for the reason why some international or regional courts have not been analyzed are presented. The study emphasizes particularly on the case law of the European Court of Human Rights, a court that has proven to be, unfortunately, more than reticent when dealing with this delicate subject.

21. Trying to respect the chronology of events, the study sets off with the presentation of the International Criminal Tribunal for Rwanda and the case of the prime-minister of Rwanda, Mister Jean Kambanda, charged, *inter alia*, with genocide. Some initial aspects are presented, in order to clarify why this case is the subject of the analysis, even in it involves a former prime-minister and not a head of state. Afterwards, the conclusions of the court are duly examined regarding the subject of head of state immunity and the possible power of precedent of the decisions pronounced in this case.

22. In the follow up, the International Criminal Tribunal for former Yugoslavia is presented, underlining the conclusions reached in the cases of former Serbian presidents Milošević and Milutinović. Logically, this chapter is mostly dedicated to the figure of the former president Milošević; the Milutinović case is less analyzed, only in a final sub-section, both because of the subsidiary character of the judgment and because the judgment did not focus on the institution of immunity.

Regarding the Milošević case, all relevant decisions are analyzed: the Trial Chamber's III decision from November the 8th, 2001 – dedicated among others to the head of state immunity subject – and the decisions pronounced by the Dutch court and the European Court of Human Rights.

After the presentation and analysis of all these decisions, the study identifies the conclusions reached by the courts regarding both procedural and substantive law immunity of a sitting or former head of state. In the end, the importance of the case and its power of precedent are underlined.

23. The next chapter deals with the activity of the major judicial for of the United Nations Organisation – the International Court of Justice. The conclusion reached by this court in the matter of head of state immunity are analyzed starting from the famous *Congo vs. Belgium* decision from 2002, when the Minister for Foreign Affairs from Rwanda was charged by the Belgian authorities with crimes against humanity.

Due to the fact that the defendant was not a head of state, the connections between a Minister for Foreign Affairs and a head of state are underlined, thus explaining the rationale for looking over

this particular judgment. Afterwards, it is examined the manner in which the court operated with the distinction between functional immunity and procedural immunity and the classification of official versus private acts, in the context of functional immunity. Stressing out the conclusions of the court, it is criticized the failure of the court to present the rule already enshrined in customary law on irrelevance of official capacity in cases of international law crimes. Thus, the court seemed to depart from the House of Lords' precedent in Pinochet.

The close connection with the Pinochet precedent is dissected in the follow up as well, but from the perspective of procedural law immunity, granted to a sitting head of state: all the hypothesis described by the court are scrutinized, in order to identify the weak point of the procedural immunity.

Eventually, the conclusions reached by the International Court of Justice point to a new direction the case law of the court in the not so far future, as the cases from following years - *Djibouti vs. France* and *The Republic of Congo vs. France* - before the same court seem to prove.

24. The case of the president of Liberia, Charles Taylor, before the Special Court for Sierra Leone is examined in the following chapter.

After presenting the evolution of the case, due to the fact that the defendant resigned from the position of head of state, the motion of Taylor on immunity from jurisdiction is analyzed.

The Court's decision, decisive both in the field of procedural immunity of a sitting head of state and in the field of substantive law immunity of a former head of state, has been heavily influenced by the *Congo vs. Belgium* precedent and its interpretation by the Special Court.

The particularity of the Special Court for Sierra Leone, the legitimacy of the tribunal in international law and its international character – all elements of utmost importance for denying the defendant's motion and the existence of his immunity – make the object of an in-depth analysis. The author's conclusion is critical as regards the findings of the Court on the subject of the binding character of provisions from the Special Court for Sierra Leone Statute for Liberia and its officials.

Although critical when presenting the Court's denial of procedural immunity to a sitting head of state, the author welcomes the fact that substantive law immunity was mentioned in the reasoning of the Court. The author concludes that the Court's reasoning thus brought light in this domain and consolidated a trend at the international law level.

25. The analysis of major international tribunals leads next to the High Tribunal for Iraq, a domestic internationalized court and the case of the former Iraqi dictator, Saddam Hussein.

The special character of this court and its legitimacy problems on the international level due to the modality of its establishment and the involvement of the United State are presented. The final conclusion is that the court represents a new type of international hybrid courts at the international level, fulfilling, as well, the minimal standard for legitimacy.

From the perspective of immunity, the findings of the Tribunal are examined, both as a first instance and in appeal and the arguments used for denying head of state immunity are underlined.

26. Chapter VII from the second part is dedicated to the analysis of the only permanent tribunal in international criminal law, namely, the International Criminal Court.

The tension at the international community level between the need for protecting human rights and the desiderate of respecting international law immunities in the context of international criminal tribunals will have to be solved by this court, a future panacea of all major international conflicts.

Before stressing out the head of state immunity before the Court – as it is provided by the Rome Statute and the subsequent normative instruments -, the major conclusions reached before on the subject of sitting and former head of state immunity before national courts are summarized. As well, in a general manner, some elements are presented in order to make a distinction between the ways in which immunity operates before national courts versus international courts.

Moving on to the legal text analysis of the relevant provisions from the Rome Statute, the dispositions of article 27 on irrelevance of official capacity are closely examined. The tension between these provisions and the ones from article 98 - cooperation with respect to waiver of immunity and consent to surrender – make the object of analysis. Solutions are proposed in order to solve this apparent conflict and distinctions are made between the hypothesis when the national state of the defendant is a party to the Rome Statute or not.

In the end, all the above mentioned is analysed not from then theoretical perspective, but from the point of view of the Court, as it has been seen in the cases of Al Bashir and Gaddafi. In these cases, the Court had to solve the problem of the binding character of the Rome Statute's provisions on state that are not parties to the Statute

27. The last chapter from the second part draws some conclusions as regard the ways in which head of state immunity can function before international criminal tribunals.

The proliferation of international tribunals in the XX and XXI centuries is heavily debated, analyzing its possible consequences, among which a certain fragmentation of international law. The inter-relations between the courts and the correlation of their case law, the impact made by various

decisions delivered in same cases or on identical legal issues make the object of the analysis. The manner in which these tribunals are obliged to respect other international courts' judgments, giving the fact that there are no dispositions regulating this and no recognized hierarchy of the international judiciary is, also, examined.

The findings of the tribunals in respect of head of state immunity and the connections that can be drawn are identified and presented in theory. Afterwards, the same problems are examined from the practical perspective, namely through the study of the case of Hissène Habré, a trial that involved and still involves courts from several countries, as well an overlap and possible friction between the International Court of Justice and the *Court of Justice of The Economic Community Of West African States*.

28. The last part of the thesis, entitled, *Après coup*, tries to summarize all the conclusions reached before.

From the perspective of the comparative law, despite the particularities of the institution in each legal system, despite the more or less similar doctrine approaches and despite the contradictory solutions found in the case law, the conclusions are in favour of the enactment recently adopted by the French legislator, with little correction made due to the specific of each legal system.

On the other hand, at the international law level, there is a general recognition that head of state immunity is – even today – characterised by certain ambiguity, due to the absence of any normative instrument in force regulating the institution. In this context, letting aside historical and juridical fundamentals, the real rationales that – despite the bold attempts of major international tribunals – permit this situation are considered to be the interference of the politics.

In the end, the author agrees with the proposals made by the International Institute. In its 2001 Vancouver session, through a project on head of state immunity, the International Institute actually codified in a consolidated manner for the first time the institution of head of state immunity at the international law level.

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