

THE PRACTICE OF SENIOR STATE OFFICER'S DIPLOMATIC IMMUNITY AGAINST SERIOUS VIOLATIONS OF HUMAN RIGHTS BY INTERNATIONAL COURT JURISPRUDENCE

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Abstrak

Penelitian ini bertujuan untuk mengkaji cara penerapan praktik hak kekebalan diplomatik untuk pejabat senior suatu negara terhadap pelanggaran berat yang dilakukannya. Penulis mengkaji berbagai jenis kekebalan yang diberikan oleh hukum internasional kepada pejabat negara, alasan diberikannya kekebalan ini, dan apakah kekebalan ini berlaku dalam kasus-kasus dimana pejabat tersebut diduga telah melakukan kejahatan internasional. Dengan menggunakan pendekatan undang-undang dan kasus, penulis juga menyajikan kasus-kasus untuk dibandingkan penerapan hak kekebalannya. Penulis berpandangan bahwa baik immunity *ratione materiae* dan immunity *ratione personae* tidak dapat diterapkan pada kasus yang merupakan pelanggaran HAM berat. Penulis juga tidak setuju dengan putusan dari ICJ dan para sarjana terkait pemberian hak kekebalan jika terjadi pelanggaran HAM berat.

Kata Kunci : Hak kekebalan diplomatik, pejabat senior pemerintahan, pengadilan internasional

Abstract

*This study examines the extend to the applicability of diplomatic immunity rights for senior officials against gross human rights violations they have committed. To achieve such aim, the author analysed the different types of immunity granted by international law to state officials, the reasons for the conferment of this immunity, and whether they apply in cases in which it is alleged that an official has committed an international crime. By using a statutory and case approach, the author examines several cases heard before international courts to compare the implementation of immunity rights. The author argues that both immunity *ratione materiae* and immunity *ratione personae* cannot be applied to cases that constitute gross violations of human rights. Moreover, instead did not agree with the argument which have been put forward by scholars and ICJ in support of the contrary.*

Keywords: Diplomatic immunity, senior officials, international courts

A. Introduction

International law is currently experiencing very rapid development so as to provide new ideas and dimensions in relation to international relations. For the implementation of international relations, implementation guidelines have been set out in international conventions. The provisions of this convention then become the basis for countries to carry out their relations with other countries. These developments include debates on the right of immunity for diplomatic representatives of state that includes heads of state to senior state officials before an international tribunal forum.

Overtime, international law has

developed and international customs have been neatly drafted, including the right to diplomatic immunity. According to Articles 27, 28 and 29 of the 1961 Vienna Convention, the right of immunity means that a diplomatic official of a country can enjoy inviolability and immunity against the jurisdiction of other countries, whether criminal, civil or administrative. According to Article 31(1) of the 1961 Vienna Convention Diplomatic officials enjoy almost absolute immunity from the jurisdiction of the receiving State for the duration of their term of office and under Article 37(1) the same immunity applies to "family members of diplomatic officers". However, immunity for acts performed in

an official capacity persists even after the end of the function (material immunity ratio or functional immunity).

The granting of immunity rights to diplomatic officials according to Article 41 (2) of the 1961 Vienna Convention is based on the opinion that diplomatic officials are symbols of their country's sovereignty. This is in line with the principle of international law *par in parlem non habet imperium* which means that a sovereign state cannot be punished by another sovereign state. But just like the prevailing principles, the existence of the right of immunity also develops.

The arrangement regarding who can be granted diplomatic immunity is affirmed according to Article 1 paragraph (a) of the 1973 New York Convention concerning persons protected under international law, that "Internationally protected person" means: "A Head of State, including any member of collegial body performing the function of a Head of State under the constitution of the State concerned, a Head of Government or a Minister of Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him". Which means that people who are protected by international law or commonly called Troika get diplomatic immunity rights when carrying out their duties in other countries.

The right of immunity enjoyed by state officials is part of the freedom to act granted by the state government. This right is granted with the aim that the official can carry out his obligations without any interference. However, this impunity cannot function if the violation of the law is carried out only for the sake of personal interests or certain groups, not in the interests of the state. According to the 1961 Vienna Convention, everyone is entitled to diplomatic privileges and immunities that will be obtained from the

time his appointment is granted to the ministry of foreign affairs or other state representative offices as may have been agreed in Article 39 paragraph 1 of the 1961 Vienna Convention which states that everyone assigned to represent the state has the right to privileges and enjoys immunities from the moment he enters the territory of the receiving country and continues to carry out his duties, or if already in the territory, from the moment when his appointment is notified to another Ministry of Foreign Affairs or an agreed equivalent department. These diplomatic privileges and immunities will continue from his departure until the end of his term of office in that country (Article 39 paragraph 2 of the 1961 Vienna Convention).

The granting of this right of immunity does not mean without limitations. As stated in Article 31 of the 1961 Vienna Convention, a diplomatic official will still be subject to legal sanctions if he commits unlawful acts that are not in the interests of the sending country. It should be underlined that the privileges and immunities of diplomatic officers do not relieve these diplomatic agents from the obligation to respect the laws and regulations of the receiving State unless this Convention makes specific exceptions in their favor. For example, diplomats must be aware of and comply with laws regarding firearms, traffic offences, theft and other serious crimes in the receiving country.

This clash of state officials' immunity rights against a law enforcement system is found in cases of serious human rights violations, because the concept of gross human rights violations recognizes and applies individual accountability in its enforcement. This is based on customary international law which states explicitly that a perpetrator of a gross violation of human rights should not be released from the legal obligation to account for the

crime that has been committed.¹

Along with the development of gross violations of human rights, the principle of universal jurisdiction has also developed. This principle explains that the criminal law of a country applies to criminal acts that violate the interests of the international community so that the act is qualified as an international crime or *delicta jure gentium*. Universal jurisdiction which is an extension of the principles in international criminal law explains the obligation to have an individual accountable for gross violations of human rights.

Individual accountability is regulated in detail by Article 25 of the Rome Statute of the International Criminal Court (Rome Statute). Paragraph 1 of Article 25 which states that the International Criminal Court (ICC) has jurisdiction over persons, not over states or organizations. Paragraph 2 of Article 25 reaffirms the principle of individual criminal responsibility while paragraph 3 distinguishes various modes of individual responsibility. Articles 25(3)(a) to (d) refer to modes of criminal participation, subparagraph (e) - incitement to genocide; subparagraph (f) - try and leave. According to paragraph 4 of article 25 the provisions on individual criminal liability do not affect the state's responsibility under international criminal law.

This then creates problems if diplomatic officials commit international crimes. There is a conflict between the principle of individual responsibility for the crime committed and the right to immunity. Many cases relate to the right of diplomatic immunity, both involving heads of state, heads of government, ministers of foreign affairs and senior government officials (state officials) (Suryokusumo, 1995). However, in practice the implementation

of this right of immunity varies in the decisions of international courts. The author will analyze the decisions of several international judicial bodies, such as the International Court of Justice (ICJ), the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL).

As in the case of Abdulaye Yerodia Ndombasi (Yerodia) who served as Minister of Foreign Affairs of the Democratic Republic of the Congo who was accused of crimes against humanity and gross human rights violations in Congo by a Belgian court, Belgium issued an international arrest warrant. This case was ruled by the International Court of Justice in Case Concerning the Arrest Warrant of April 11, 2000 (Democratic Republic of the Congo v. Belgium, para. 78), which was declared discontinued because Belgian courts did not have jurisdiction to try and issue arrest warrants against Minister of Foreign Affairs of the Congo.² While in the case of Sierra Leone, On March 7, 2003, Charles Taylor (Taylor), the then Head of State of Liberia, was indicted for crimes against humanity, general violation of article 3 of the Geneva Conventions and its Additional Protocols and other serious violations of international humanitarian law that allegedly committed in the Sierra Leone region during the civil war. And in the same year Taylor decided to step down from his position as head of state. The Court of Appeal concluded that "it now appears to be established that equality of state sovereignty does not prevent a Head of State from being prosecuted before an international criminal court or tribunal." In other words, the *ratione personae* immunity of an incumbent Head of State is not an acceptable barrier to criminal prosecution and trial before international

¹ Simorangkir, J.C.T, *Hukum dan Konstitusi Indonesia*, 1983, Jakarta, Gunung Agung

² Application for Arrest Warrant Against General Shaul Mofaz (District Judge Pratt, Bow Street Magistrates' Court februari, 2004).

judicial bodies.

However, on the other hand there are also international courts that are in line with applicable international law by not granting the right of diplomatic immunity to senior government officials. As in the International Criminal Court (ICC) in the case of Omar Al Bashir, although the ICC ultimately stripped Omar of diplomatic immunity, but in the ICC decision for Malawi and other countries that refused to arrest Omar, the ICC justified their actions on the basis of Omar's diplomatic immunity as head country.

The difference in decisions between international courts, the certainty in the enforcement of international criminal law regarding the incumbent officials raises the question of the extent to which the right of diplomatic immunity can be applied or used by senior officials of a country before an international court in terms of international law. Although it has been implicitly acknowledged that senior officials of a country get protection, this is still a debate among scholars, especially regarding the immunity rights granted by the foreign minister as granted by the ICJ to Yerodia. From the description above, the author is interested in writing about how the implementation and practice of the right of immunity is obtained by senior officials of a country for involvement in international crimes according to the jurisdiction of international courts.

B. Research Method

Research Methods This type of research is normative legal research, using a statutory and case approach. This research is prescriptive by using primary legal materials and secondary legal materials. Data collection techniques with literature study of legal materials.

C. Research Result and Discussion

It has been regulated in customary international law that the Head of State and his staff who are accredited to a foreign country have such immunity from the jurisdiction of a foreign country. In addition, the 1961 Vienna Convention provides similar immunity to diplomats, state representatives to international organizations, and other officials on special missions in foreign countries. The justification for this diplomatic immunity is to ensure smooth international relations so that this right is given to state officials who represent countries at the international level.³

Senior state officials, in general, are immune from the jurisdiction of other states in their official actions ('functional immunity' or 'immunity *ratione materiae*'). the name of the representative of a country with respect to their official act. Thus, the immunity associated with these actions can be relied upon by senior officials of a country with respect to official actions taken while in office. It can also be used by persons or entities who are not state officials or bodies but have acted on behalf of the state. The application of immunity *ratione materiae* for state officials is more common in civil cases than in criminal cases.

There are important exceptions in times of international armed conflict where a representative of a state will often perform their official functions on the territory of the opposing state. However, international humanitarian law has provided that these officials should not be subject to criminal prosecution at the hands of an enemy state solely for their involvement in the hostilities as long as they comply with the laws and customs of war. Thus, the circumstances under which a representative official of a country may

³ Missions, UN Convention on Special, UN Convention on Special Missions, 1969, UNTS

face criminal charges in a foreign country due to the acts committed in their official acts are restricted.

There are two related policies that underlie the provision of immunity *ratione materiae*. First, this type of immunity is a defense of state actions, in this case it shows that officials of a state do not have to be legally responsible for actions involving official actions of that state. Such action can only be imposed on the state and immunity *ratione materiae* is a mechanism to shift responsibility to the state. So the author argues that immunity *ratione materiae* cannot apply in the cases discussed in this paper.

International law also provides immunity to certain state officials attached to the position or status of the official. This immunity, which is granted only for as long as the official remains in office, is usually described as 'personal immunity' or 'rational *personae* immunity'.⁴ There are two further justifications for the immunity *ratione personae*, beyond 'functional' reasons, that might be used: (1) symbolic sovereignty and (2) the principle of 'non-intervention'. It should be emphasized that none of these reasons can be considered the sole justification for the immunity *ratione personae*.

First, it is argued that the immunity rule for Heads of State 'reflects the remnants of the dignity that once attached to kings and princes and the remnants of the idea of the incarnation of the state in their rulers'. Heads of State and senior officials are given immunity *ratione personae* not only because of the functions they perform, but also because of what it symbolizes, namely a sovereign state. The position and nature of the Head of State reflects the sovereignty of the state and the immunities granted to him in part

out of respect for the dignity of the country represented by the office.

Although the understanding and practice of the right of immunity against senior officials is uncertain and not uniform. In many countries, it is the Head of Government who is the effective leader of the state. So arresting and detaining him is as damaging to the autonomy of the state as was the case with the Head of State. The principle of non-intervention is a further justification for absolute immunity from criminal jurisdiction for the Head of State. The principle is 'a consequence of the principle of equality of state sovereignty', which is the basis for the immunity of the state from the jurisdiction of other states (*par in parem non habet imperium*). Arresting and detaining the leader of a country effectively changes the government of that country. This will be a form of interference with the autonomy and independence of the foreign country. The notion of independence means that a state has exclusive jurisdiction to appoint its own government and that other states are not authorized to intervene in this matter.

There are differences between the two types of immunity of state officials: *ratione personae* immunity and *ratione materiae* immunity. Immunity *ratione personae* or personal immunity comes from the status of the official and the position he holds and from the duties assigned by the state to officials who are required to carry out their duties in that place. This type of immunity from foreign criminal jurisdiction is enjoyed by officials occupying senior positions in a government and by diplomatic representatives approved by the host State in accordance with customary international law and with article 31, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

⁴ Konvensi Wina, apri, 18, 1961

Immunity *ratione personae* has expanded its application to actions taken by state officials both in official and personal actions, both before and while taking office. Because it relates to the position held by an official in government service, it is only temporary, and applies when the official takes office and stops when he leaves his position. State officials enjoy immunity *ratione materiae* regardless of their level of office, based on the fact that they have to carry out official State duties. Immunity *ratione materiae* is sometimes called functional immunity. This type of immunity can be applied only to actions carried out by state officials acting in an official capacity, i.e. carried out to fulfill state functions. Therefore, it is not useful when the official performs an act of a personal nature. When the official leaves a government service position, the official still enjoys immunity *ratione personae* in connection with the actions taken during his official tenure.

If want to be categorized, then immunity *ratione personae* can be enjoyed by certain state officials and immunity *ratione materiae* can be enjoyed by all officials in their capacity in foreign jurisdictions. Therefore, in order to distinguish more precisely the types of immunity in the case of high-ranking officials, it is sometimes said that *persona ration immunity* applies only to acts committed by them in a personal capacity. In an official state capacity, an official's actions are protected by an immunity *ratione personae*, regardless of the question of whether the official has taken up the post or has left it.

The justification for this diplomatic immunity is to ensure smooth international relations so that this right is given to state officials who represent countries at the international level. Thus, immunity relating

to any action can be relied upon by a senior official of a country with respect to official actions taken while in office. However, international humanitarian law has provided that these officials should not be subject to criminal prosecution at the hands of an enemy state solely for their involvement in the hostilities as long as they comply with the laws and customs of war. Thus, the circumstances under which a representative official of a country may face criminal charges in a foreign country due to the acts committed in their official acts are restricted.

It can be seen about the Immunity *ratione personae* attached to the head of state and his staff such as ministers and diplomats who are carrying out their duties abroad and committing criminal acts. Senior officials who are granted immunity *ratione personae* will be released from criminal proceedings in foreign countries if they commit a crime. The absolute nature of immunity *ratione personae* is to renounce criminal jurisdiction not only in cases involving individuals in their capacity but also in cases outside their capacity as state officials. For this reason, this type of immunity, where applicable, is generally considered an absolute prohibition on the exercise of criminal jurisdiction by the state. Thus, attempts to arrest or prosecute these officials would be a violation of the immunity *ratione personae*⁵.

In the case of the Arrest Warrant of 11 April 2000 (ICJ), the ICJ stated that the Minister of Foreign Affairs was entitled to *ratione personae* immunity, and further stated that the absolute nature of immunity from criminal proceedings granted to the minister of foreign affairs in charge persists even when accused of committing a an international crime and applies even when the foreign minister is abroad on a

⁵ *Arrest Warrant case, para.54*

personal visit. The ICJ concludes that under customary international law, there are exceptions to this rule in accordance with the immunity from criminal jurisdiction and inviolability granted to incumbent Ministers of Foreign Affairs where they are accused of war crimes or crimes against humanity.⁶

In cases where officials represent a country in international organizations, they will usually be granted immunity by treaty. Similarly, under Articles 29 and 31 of the United Nations Convention on Special Missions 1969, officials abroad on special missions on behalf of their country are inviolable, meaning that such officials may not be arrested or detained (Convention on Special Missions, 1969). Furthermore, Article 31 of the Convention provides that 'representatives of the sending State on special missions and members of its diplomatic staff are immune from criminal jurisdiction of the receiving State'. The policy underlying this right of immunity is consistent with that issued by the ICJ in the Arrest Warrant Case.

In contrast to the ICJ's decision, other international courts such as the ICC in the case of Omar Al Bashir and the SCSL in the case of Charles Taylor argue that immunity *ratione personae* cannot apply before an international court. The legal basis for revoking the immunity *ratione personae* of senior State Officials in office in the context of crimes under international law can be found either in the statutes of international courts or in customary international law. In the sub-chapter of research results, several international judicial bodies assume that there is no relevance between positions and the application of revocation of diplomatic immunity as contained in the statutes of

each court.⁷ International tribunals rely on lifting the immunity *ratione personae*, which the States have agreed to either by ratifying international treaties or by imposing sanctions in the context of Security Council resolutions, which must be respected by UN members.

In the decision regarding the arrest warrant for Omar al Bashir, based on the Security Council resolution referring to the situation in Darfur/Sudan, the ICC has the Jurisdiction to apply all provisions of the Rome Statute, including Article 27.⁸ This article stipulates that immunity under national or international law attached to a person's official position may prevent the Court from exercising jurisdiction over it. So the immunity rights attached to senior state officials can be automatically revoked by the ICC if the country has ratified the Rome Statute. In a subsequent decision in the case of Omar al Bashir, the PTC deviated from the provisions of the Rome Statute regarding third countries that have not ratified the Rome Statute, that in that provision to waive the right of immunity is with the consent of the sending country. However, the PTC has a legal basis for eliminating immunity *ratione personae*, implicitly, contained in Sudan's obligation to cooperate with the ICC as regulated in Security Council resolutions and also the rules of customary international law which stipulate that no immunity can be applied before an international court.⁹

The last reason was also stated in the Charles Taylor decision where SCSL stated that the immunity *ratione personae* could not protect the incumbent Head of State from criminal prosecution and trial before an international judiciary.¹⁰ The rationale for this argument is not on the

⁶ *Ibid.*

⁷ The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09

⁸ *Ibid.*, Aart 27 of Rome Statute

⁹ Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests, 2011

¹⁰ *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, 31 May 2004

basis of the gravity of the crimes charged but on the international character of the courts or tribunals involved. As can be seen in the nature of International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for former Rwanda, which from the beginning did not recognize the existence of immunity rights either *ratione personae* or *ratione materiae*.

The ICJ in the Arrest Warrant Case and the ICC in article 27 of the Rome Statute stipulate four situations in which a senior state official can be prosecuted:

- a) Prosecution in one's own country in accordance with domestic law [the law of international immunity is not recognized before national courts];
- b) If his country waives his immunity, then prosecution before a foreign court;
- c) When he ceases to be Minister of Foreign Affairs, he shall no longer enjoy immunity before foreign courts for personal acts committed during his tenure as Minister of Foreign Affairs; and for all actions taken before or after his term of office; and
- d) Prosecution before an international criminal body, with the required jurisdiction (eg ICC).

In cases involving the immunity rights of senior government officials before international courts, there is a conflict of obligation which is at the heart of the problem. Where a conflict of obligation is a conflict between two rights and/or obligations both in one agreement and between international agreements¹¹. In this issue of immunity rights, there are two conflicts of obligation, the first is in Article 36 of the 1961 Vienna Convention with Article 27 of the Rome Statute, and the second is between articles 27 and 98 of the Rome Statute. For the resolution of the first conflict, the author argues that in the

context of serious human rights violations, senior officials' immunity rights are lost before international courts. This is in accordance with *jus cogens* and the UN charter that article 36 of the 1961 Vienna Convention only applies to domestic courts of a country.

Second, in the Rome Statute itself there are two contradictory articles, namely Article 27 and Article 98. This can be reflected in the case concerning the arrest of Omar Al Bashir by Malawi and Chad. Where Malawi and Chad which are members of the African Union followed the decision of the African Union countries to refuse to arrest and hand over Omar to the ICC. In PTC I, separately, it was stated that these two countries could not use article 98 as a legal basis for not cooperating with the ICC in the arrest of Omar. Where Article 98 explains that the revocation of immunity rights is based on the approval of the sending country which is not a member of the ICC. The PTC stated that according to Article 27, there is no right of immunity whatsoever that can prevent the ICC from arresting and prosecuting Omar because the right of immunity does not apply before an international court.

In resolving conflicts of obligations in international law, some norms must be considered more important than other norms or obligations. In the case of Omar Al-Bashir, the ICC's request to Malawi, Chad and the DRC to arrest Omar embodies the obligation to cooperate with the ICC and is considered an obligation of *erga omnes*. This obligation arises against the international community as a whole and each State is considered to have a legal interest to protect. In addition, state practice and *opinio juris* show that *erga omnes* reflects the strengthening of *jus cogens* norms. Therefore, the obligation to

¹¹ Erich Vranes, The Definition of 'Norm Conflict' in International Law and Legal Theory, *European Journal*

of International Law, Volume 17, Issue 2, 1 April 2006, Pages 398

cooperate with the ICC applies because the actions of these senior officials include gross human rights violations and violate the *jus cogens* norm. In addition, failure to cooperate with the ICC will hinder the strengthening of the *jus cogens* norm itself. Therefore, the obligation to cooperate with the ICC will apply in the matter.

It is important to note that, although the ICC ultimately found Malawi and Chad guilty of acts of non-cooperation with the ICC, in the appeals chamber, the ICC stated that the head of state's immunity rights may apply and justify Malawi and Chad's actions. Like the ICJ's decision in the Arrest Warrant Case, the ICC's decision for Chad and Malawi has also been in the spotlight of the international community and is considered controversial. This is because the European Union and African Union countries are reluctant to cooperate with the ICC.

When viewed according to state practice, especially in national court decisions, it is generally recognized that all State officials enjoy immunity from foreign criminal jurisdiction in connection with acts committed by them in their official capacity, or Immunity *ratione materiae*. As noted by Lord Browne-Wilkinson in the case of Pinochet No. 3 on the House of Lord¹², "The immunity *ratione materiae* applies not only to former heads of state and former ambassadors but also to all state officials who have been involved in carrying out state functions." State officials enjoy such immunity regardless of their level of office. Another example, for example, in 2006 in the case of *Belhas et al. v. Moshe Ya'alon*¹³, The United States

District Court for the District of Columbia recognized the immunity of M. Ya'alon, who enjoys immunity from their office, because only his office can sign international treaties on behalf of their State without the need to grant full powers.¹⁴ The special status and special nature of the immunity of the Head of Government and the minister of foreign affairs is confirmed in article 21 of the 1969 Convention on Special Missions, in article 1, paragraph 1(a), of the 1973 Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. and in article 50 of the 1975 Vienna Convention on the Representation of States in Relations with International Organizations of a Universal Character¹⁵.

Apart from the Arrest Warrant Case, there is almost no information about cases involving the immunity of the foreign minister. In 1963, a United States court refused to consider a lawsuit against the Minister of Foreign Affairs of the Republic of Korea. It should be noted that the "suggestion" of the State Department, in addition to stating that the secretary of state enjoys immunity from the jurisdiction of the United States courts in accordance with customary international law, also mentions the recognition of the diplomatic status of the Minister for the Foreign Affairs of the Republic of Korea, because at the time he was conducting official visit to the United States. In 2001, the United States District Court approved the "immunity proposal" submitted by the Government with respect to the Minister for Foreign Affairs of Zimbabwe in the

¹² *Ibid.*

¹³ United States Court of Appeals, District of Columbia Circuit, *Ali Saadallah BELHAS et al., Appellants v. Moshe YA'ALON, former Head of Army Intelligence Israel, Appellee.*

¹⁴ pasal 7, paragraf 2, Vienna Convention on The Law of The Treaties

¹⁵ Hutton, L. B.-W. (1998). *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet.* 939-940 945-946.

case of *Tachiona v. Mugabe*¹⁶.

It has been regulated in article 21 of the 1969 Convention on Special Missions and article 50 of the 1975 Vienna Convention on the Representation of States in Relations with International Organizations of a Universal Character that, apart from Heads of State, Heads of Government and Ministers of Foreign Affairs, another category of people has special status. under international law: "person of high rank". The fact that there are other high-ranking officials besides the Head of State, Head of Government, and foreign minister who under customary international law enjoy personal immunity from foreign criminal jurisdiction is confirmed in paragraph 51 of the ICJ ruling in the Arrest Warrant case. It is clear that, although the ICJ also does not say exactly which high-ranking officials – other than the Head of State, Head of Government, and the minister of foreign affairs – enjoy immunity from foreign jurisdiction, it does make clear that the category of officials is not limited to these three.

The author argues that the implementation of the right of immunity against senior officials under the ICC and SCSL is in line with applicable international law. Even though senior officials from representatives of this country must indeed be protected, their rights and obligations to carry out their duties in an official capacity as representatives of their home countries. However, in the event of serious human rights violations or violations of jus cogens, the immunity rights of senior state officials cannot save the relevant officials from international court proceedings. Furthermore, the author considers that the ICJ's decision to grant immunity rights for the *Yerodia Arrest Warrant Case* is not in

accordance with international law that should apply, although it is recognized that state representatives have the right to immunity, but the country should further refer the ICC to follow up on this matter.

D. Conclusion

It has been regulated in customary international law that the Head of State and his staff who are sent to a foreign country to represent his country have such immunity from the jurisdiction of foreign countries. The justification for this diplomatic immunity is to ensure smooth international relations so that this right is given to state officials who represent countries at the international level. Thus, immunity relating to any action can be relied upon by a senior official of a country with respect to official actions taken while in office. However, international humanitarian law has provided that these officials should not be subject to criminal prosecution at the hands of an enemy state solely for their involvement in the hostilities as long as they comply with the laws and customs of war. Thus, the circumstances under which a representative official of a country may face criminal charges in a foreign country due to the acts committed in their official acts are restricted. International law also provides immunity to certain state officials attached to the position or status of the official. First, it is argued that the immunity rule for Heads of State 'reflects the remnants of the dignity that once attached to kings and princes and the remnants of the idea of the incarnation of the state in their rulers'. Heads of State and senior officials are given immunity *ratione personae* not only because of the functions they perform, but also because of what it symbolizes, namely a sovereign

¹⁶ *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), U.S. District Court for the Southern District of New York

state. Although the understanding and practice of the right of immunity against senior officials is uncertain and not uniform. In many countries, it is the Head of Government who is the effective leader of the state. There are differences between the two types of immunity of state officials: *ratione personae* immunity and *ratione materiae* immunity.

Immunity *ratione personae* or personal immunity comes from the status of the official and the position he holds and from the duties assigned by the state to officials who are required to carry out their duties in that place. This type of immunity can be applied only to actions carried out by state officials acting in an official capacity, i.e. carried out to fulfill state functions. Therefore, it is not useful when the official performs an act of a personal nature. If you want to be categorized, then immunity *ratione personae* can be enjoyed by certain state officials and immunity *ratione materiae* can be enjoyed by all officials in their capacity in foreign jurisdictions. Therefore, in order to distinguish more precisely the types of immunity in the case of high-ranking officials, it is sometimes said that *persona ration* immunity applies

only to acts committed by them in a personal capacity. Senior officials who are granted immunity *ratione personae* will be released from criminal proceedings in foreign countries if they commit a crime. The absolute nature of immunity *ratione personae* is to renounce criminal jurisdiction not only in cases involving individuals in their capacity but also in cases beyond their capacity as state officials.

E. Suggestion

There is a need for standard and uniform guidelines regarding the right of diplomatic immunity. Moreover, in making decisions, it must be noted that although there are protections for senior state officials, if they violate *jus cogens*, there is no right of immunity that can protect them before international courts. States and international judicial bodies must work together so that there is no culture of impunity that is obtained by senior state officials, especially when it comes to gross violations of human rights. With this cooperation, it is hoped that harmonization and fair law will be created for the international community.

BIBLIOGRAPHY

Case

Arrest Warrant (International Court Justice april 11, 2000)..

Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests, *icc-02/05-01/09* (ICC Desember 12, 2011).

Prosectur v. Taylor, SCSL 2003-01-I (SCSL May 31, 2004).

The Prosecture v. Omar Hassan Ahmad Al Bashir, *icc-02/05-01/09* (ICC march 4, 2009).

United States Court of Appeals, District of Columbia Circuit, Ali Saadallah BELHAS et al., Appellants v. Moshe YA'ALON, former Head of Army Intelligence Israel, Appellee
Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), U.S. District Court for the Southern District of New York

Hutton, L. B.-W. (1998). R. v. Bow Street Stipendiary Magistrate and others, *ex parte Pinochet*. 939-940 945-946.

Book and Journal

Application for Arrest Warrant Against General Shaul Mofaz (District Judge Pratt, Bow Street Magistrates' Court februari, 2004).

Simorangkir, J. (1983). Hukum dan Konstitusi Indonesia. Jakarta: Gunung Agung.

Erich Vranes, The Definition of 'Norm Conflict' in International Law and Legal Theory, European Journal of International Law, Volume 17, Issue 2, 1 April 2006, Pages 398

Convention and Statute

Convention on Special Missions (december 8, 1969).

Vienna Convention on Diplomatic Relation (april 18, 1961).

Vienna Convention on the Law of the Treaties

Missions, U. C. (1969). UN Convention on Special Missions. UNTS.