



Master thesis review

University: Palacký University in Olomouc
Faculty: Faculty of Law
Department: Department of International and European Law
Graduand: Fodé TRAORÉ

Thesis title: The International Criminal Court and the Head of State Immunity
Thesis supervisor: doc. JUDr. Ondřej Svaček, Ph.D. LL.M.
Thesis reviewer: JUDr. Pavel Bureš, Ph.D., D.E.A.

Topicality of the issue

The idea for creation of a world criminal court was led mainly by an effort to combat impunity for crimes under international law committed by high-ranking state officials which might have been hiding behind their functions before home state courts or even abroad. The International Criminal Court that was created by Rome Statute in 2002 stands upon the principle of irrelevance of official capacity (Art. 27 ICC Statute). If the concept as such is clear and logic, its practicality and applicability remains foggy and somehow mysterious. The case of then on-going Sudanese president Omar al-Bashir showed what a difficult procedural situation the ICC is in. This concrete procedural impasse had then various solutions. After several years, it is a good time to analyse the issue of head of State immunity before the ICC with a sufficient distance. There is no need so, to come up with a solution for an on-going case before the ICC, but rather to present the topic in its entirety, as much complex as it is and to portray different views and opinions by the doctrine. It is what Fodé Traoré has presented in his master thesis.

Formal and linguistic assessment

The author of master thesis, written in English, has basically respected the requirements stipulated in the Dean's directive for qualification theses PF UPOL S 2/2010. The level of English is quite correct. However, there is a big incoherence in writings capital letters (State/state, court/Court) or typing mistakes (Rome status). From time to time, sentences are even incomprehensible. References and quotations are correct in general. However one can see that references to case-law has not been done in a correct way. Fodé's master thesis comprises the list of abbreviation and structured list of bibliography.

Content assessment

The master thesis is divided, besides introduction and conclusion, into four substantial chapters: in the first chapter, the author presents basic rules on head of States immunity. This chapter serves as a general introduction to the topic. Then the author develops the legal scope of the immunities before the ICC. In the next chapter, the author goes further in its analysis and presents the topic of immunity in the connection of Security Council referral. He ends up a portrait of customary rules on exception from personal immunity before international criminal tribunals.

In general, the paper is rather a shallow compilation with numerous misunderstandings. Right in the very beginning, the author mixes up diplomatic and consular privileges and immunities with those of head of States and other high-ranking State officials. If, in terms of criminal responsibility is rather possible for latter-ones to be prosecuted before foreign criminal courts (or even international criminal tribunals) for crimes under international law, it is rather unconceivable for the former-ones. Moreover, when presenting basic rules on immunities of head of States from foreign criminal jurisdiction, Fodé Traoré omits explicitly to mention the principle of universality that allows foreign criminal authorities to initiate proceedings without a link to the location (territoriality) or a perpetrator/victim (active/passive personality). Further, he puts forward the concept of “absence of immunity *ratione materiae*” in case of international crimes which is rather an exception or limitation to the rule of immunity than an absence of immunity. It is also very unfortunate, Fodé has not made any reference to the ILC works in this issue. The draft article 7 of Draft Articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Commission (ILC) and the commentary thereto speaks explicitly about such a concept on non-application.

The chapter on UN Security Council referral lacks a clear presentation of the situation for States which are not parties to the ICC. Even though, the author presents three scenarios, it is not evident whether he is a partisan of one of them and why. Similarly, he has not made any reference to the obligation of States to cooperate with the ICC, which was minutely scrutinized in the ILC Special Rapporteur's eighth report on the issue.

Last chapter on customary rules on immunity within the scope of international criminal tribunals should encompass first a theoretic basis for customary rules creation and then specially a detailed analysis of whether such a customary rule has already been established or is in the process of establishment. Such a clear analysis is missing in Fodé's paper.

General conclusive assessment

The topic lies in the specific discipline of international criminal law with a basis however in classical rules on immunities of State officials from foreign criminal jurisdiction. Fodé has presented rather simplistic and limited analysis of the topic without clear answers. However, his thesis meets basic requirements for master thesis, thus I do recommend his paper for public defence and suggest general assessment with the classification mark:

D

During the defence the author could give an answer to following questions:

- 1) What are in fact exceptions and limitations to immunity rule for State officials from foreign criminal jurisdictions presented by the ILC in its work?
- 2) Do you think a customary rule on heads of State immunity before international criminal tribunals has been already created? What are your arguments pros and cons?

Done in Olomouc, 24 February 2022

JUDr. Pavel Bureš, Ph.D., D.E.A.