



UNIVERSITY OF CAPE TOWN

School for Advanced Legal Studies

Private Bag X3, Rondebosch, 7701, South Africa

DEPARTEMENT OF PUBLIC LAW

THE EFFICIENCY OF ARREST WARRANTS ISSUED BY THE ICC VIS-A-VIS THE PRINCIPLE OF IMMUNITY: CASE STUDY OF THE SUDANESE AUTHORITIES

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master's of Laws in Criminal Justice. The other part of the requirements for this degree was completion of a programme of courses.

By **Pierre Célestin SIBOMANA**

Student number: **SBMPIE001**

DEGREE: LLM

SUPERVISOR: M. Salim A. Nakhjavani

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

December 2009

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DECLARATION

I, Pierre Célestin Sibomana, do hereby declare that this minor dissertation submitted for the degree of Master of Laws at the University of Cape Town has not previously been submitted by me at this or any other University, that it is my own work and that all sources and all referenced material in it have been acknowledged.

Signed by candidate

Pierre Célestin SIBOMANA

DEDICATION

To Almighty God for taking me this far in my academic career

To my family for their unwavering love and support

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LIST OF ABBREVIATIONS

AJIL	American Journal of international Law
AJLS	African Journal of Legal Studies
AU	African Union
BBC	British Broadcasting Corporation
BJIL	Brook Journal of International Law
BUIIJ	Boston University International Law Journal
DC	District Court
DLJ	Duke Law Journal
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
Ed	Edition
EJIL	European Journal of International Law
ETS	European Treaty Series
HHLR	Harvard Human Rights Journal
HL	House of Lords
HLR	Harvard Law Review
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Court for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

IFOR	Implementation Force
IJIL	Indian Journal of International Law
ILM	International Legal Materials
IMT	International Military Tribunal
JICJ	Journal of International Criminal Justice
LCP	Law and Contemporary Problems
LNTS	League of Nations Treaty Series
MGJL	MicGill Law Journal/Revue de Droit de MicGill
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NY	New York
Para	Paragraph
PCIJ	Permanent Court of International Justice
SC	Security Council
S/RES	Security (Council) Resolution
SCSL	Special Court for Sierra Leone
SDNY	Southern District of New York
SFOR	Stabilisation Force
SJIL	Stanford Journal of International Law
TICLJ	Temple International and Comparative Law Journal
UK	United Kingdom
UN	United Nation
UNISCI	Unit on International Security and Cooperation

UNSC	United Nations Security Council
UNSCI	United Nations Convention on State Immunity
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
Vol	Volume
WW II	World War II

ABSTRACT

Justice is a gamut that begins from the pronouncements and substance of the law to the different stages and forms of its enforcement. There are effective problems that are associated with this phenomenon. The problem of whether heads of states may be brought before courts to be criminally prosecuted is still an unsettled area of Law. This dissertation examines the efficiency of arrest warrants issued by the International Criminal Court (ICC) vis-à-vis the principle of immunity with Sudanese authorities as a case study. This problem of criminally prosecuting heads of states raises problems in international law as they normally enjoy immunity from prosecution.

This dissertation studies the scope of heads of states immunity and analyses it within actual practice in regards with prosecuting international crimes. I argue that, apart from the existing states practice, a high level of states' involvement and the contribution of different organizations are prerequisites for an effective prosecution of the core heinous international crimes. I find that World today cannot leave perpetrators of such crimes going unpunished.

Even if the issuance of arrest warrants may deter the commission of crimes in Darfur by demonstrating that perpetrators of such crimes will be held legally accountable for their actions, the work of the Court and the threat of future prosecutions may act to exert additional pressure on the parties of the conflict to negotiate and commit to a peaceful resolution of the conflict in Darfur. I find that the issuance of an arrest warrant for sitting government officials will also potentially have the effect of diminishing the perceived legitimacy of the Government of Sudan, especially if it continues its refusal to cooperate with the Court and shields the alleged perpetrators from prosecution. Foreign governments and companies, especially under increasing public pressure, will likely be more hesitant to work with an alleged criminal regime and thus possibly take steps to distance themselves from the Sudanese government, therefore potentially politically and economically isolating the current regime. Thus, the arrest warrants likely could put increased pressure on the Sudanese government to change its current policy towards Darfur. Generally, the identification of specific suspects and the issuance of arrest warrants represent the first steps towards providing justice to the victims of atrocities in Darfur.

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CHAPTER I – INTRODUCTION

1.1 Background to the Study

International law is yet to determine when a Head of State may be prosecuted for the commission of international crimes.¹ In fact, heads of state enjoy the immunity associated with their status, which immunity is nevertheless not completely clear in regard to its meaning and scope.² Albeit such lack of clarity, recent times have seen many efforts by international judicial organs trying to bring heads of states, former or sitting, to book.

In this regard, the United Nations Security Council (UNSC) has determined that the situation in Sudan constitutes a threat to international peace and security, acting under Chapter VII of the Charter, thus decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (hereafter the ICC).³ The UNSC mandates the Prosecutor of the ICC to investigate and prosecute crimes committed in Darfur.

Two months later, the Office of the Prosecutor accepted the referral and decided to initiate the investigation.⁴ On July 10, 2008, the ICC Prosecutor Luis Moreno-Ocampo informed the UNSC that he would be issue an indictment against Sudanese President Omar Hassan Al-Bashir (hereafter Al-Bashir) on charges of genocide and crimes against humanity for events in Darfur.⁵ On 4 March 2009, the Judges of the ICC Pre-Trial Chamber I issued an arrest warrant against Al-Bashir. He is charged with war crimes for directing attacks against a civilian population or against individual civilians and pillaging. He is also charged with the crimes against humanity for murder, extermination, forcible transfer, torture and rape.⁶

¹ AM Tunks 'Diplomats or defendants? Defining the future of Head-of-State immunity' (2002) 52 DLJ 651 at 651. See also P Mugemangango *Immunity from prosecution for genocide, crime against humanity and war crime: the case of heads of state* (2004)1. Available at <http://www.up.ac.za/dspace/bitstream/2263/1088/1> [Accessed on 30 June 2009].

² AK Geert-Jan *Theory and practice of international and internationalized criminal proceedings* (2005) 24.

³ S/RES/1593 (2005) para 1. Available at <http://www.icc-cpi.int> [Accessed 12 June 2009].

⁴ P Castillo 'Rethinking deterrence: The International Criminal Court in Sudan' in *UNISCI Discussion Papers* No 13 (2007) 167-184. Available at <http://www.brooklaw.edu> [Accessed 19 June 2009].

⁵ T Ginsburg *The clash of commitments at International Criminal Court*. Available at <http://works.bepress.com> [Accessed 15 June 2009].

⁶ Ninth Report of the Prosecutor of the ICC to the UNSC (2009) para 33. Available at <http://www.icc-cpi.org> [Accessed 12 June 2009].

This recent move by the ICC Prosecutor seeking the indictment of Sudanese President Al-Bashir on grounds of aiding and abetting the commission of war crimes, crimes against humanity and genocide in Darfur has taken the World by storm. Ocampo has stated that for his role in the alleged murder of over 35,000 Darfuris and another 2.5 million subjected to a campaign of rape, hunger and fear by Sudanese armed forces and the Janjaweed⁷ militia in what he called 'genocide by attrition'⁸ even if the Pre-Trial Chamber did not yet uphold the arrest warrant for genocide.

The Al-Bashir case is not the first brought before the ICC for the Sudanese crisis. The ICC Pre-Trial Chambers has also issued arrest warrants for two other prominent Sudanese, Ahmad Harun and Ali Kushayb. Ahmad Harun is a former Minister of State for the Interior and now Minister of Internal Affairs, while Ali Kushayb is a Janjaweed militia Leader. The pair has been charged on 51 counts of crimes against humanity and war crimes.⁹ The three Sudanese leaders are charged of crimes committed against the Fur, Masalit and Zaghawa ethnic groups in Sudan.

The indictment of President Al-Bashir marks the first time the ICC has indicted a sitting head of state, and raises interesting issues of immunity, jurisdiction, and joint criminal responsibility, thus establishing a potential and extremely controversial precedent. However, if President Al-Bashir is indicted by the ICC, this will not be the first time an international tribunal has indicted and issued an arrest warrant for a serving head of state. The International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Slobodan Milošević whilst he was still the head of state of the Federal Republic of Yugoslavia. Similarly, the Special Court for Sierra Leone (SCSL) indicted Charles Taylor while he was president of neighbouring Liberia even if their trials commenced after they left office.¹⁰ In both cases, the principle of heads of state immunity was not considered.¹¹

⁷ 'The Janjaweed is a blanket term used to describe mostly armed gunmen in Darfur, western Sudan, and now eastern Chad. The Janjaweed are armed partisans drawn from Darfurian and Arabic-speaking tribes that became notorious for alleged massacre, rape, forced displacement and torture in 1990 and from 2001 up to now.'

⁸ S Oola *Bashir and the ICC: The aura or audition of international justice in Africa?* Available at <http://www.csls.ox.ac.uk/documents> [Accessed 1st September 2009].

⁹ *Supra* (note 6) para 6.

¹⁰ D Akande *The Bashir indictment: Are serving Heads of State immune from prosecution?* Available at <http://www.asil.org> [Accessed 15 June 2009].

¹¹ Both the ICTY and SCSL judges dismissed the motions that the accused were entitled of immunity owing to respective Courts Statutes.

In *Regina v. Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)*¹², the House of Lords denied immunity to Senator Augusto Pinochet in pursuance of a charge of conspiracy to commit torture even if he has not been prosecuted due to his elder age. On the contrary, in September 2003, Zimbabwe's President Robert Mugabe visited New York to attend the UN Millennium Summit, he was served with summons for a lawsuit alleging that he had organised assassinations, torture, rape, terrorism, and other acts of violence in a campaign designed to quash his political opponents. The US State Department submitted an official document to the New York District Court declaring that President Mugabe was entitled to head of state immunity in US courts, which the court confirmed in its decision.¹³

It is generally accepted that under international law, serving heads of state are immune from jurisdiction of other states.¹⁴ Therefore, in principle they are not subject to arrest or to criminal process of other states.¹⁵ This immunity is a right which accrues not to the individual but to his or her state and regulates the effective conducting of interstates relations.¹⁶

1.2 Statement of the Problem

Under international law, the immunity of heads of state shields them from criminal prosecution by the time they are sitting or are no longer sitting for acts performed when in office.¹⁷ But as has been mentioned above, there have been efforts to shift from the classical approach to the immunity so that it may not be used as a smokescreen for international crimes committed by heads of states. Nevertheless, as is indicated in the following lines, and with reference to the case of Al-Bashir, state and judicial organs practices have not allowed thus far a harmonised approach as would normally be heralded by states intent under international law.

¹² *R v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet*, [2000] 1 AC 147 (HL) at 841.

¹³ A Sarah *U.S. courts rules on absolute immunity and inviolability of foreign Heads of State: The cases against Mugabe and Jiang Zemin*. Available at <http://www.asil.org> [Accessed 19 June 2009].

See also P Mugemangango (*ibid* note 1)

¹⁴ G Werle *Principles of International Criminal Law* (2005) 172.

¹⁵ *Ibid*

¹⁶ Mugemangango (note 1) 2.

¹⁷ See in the same sense FL Kirgis *The indictment in Senegal of former Chad Head of State*, February 2000. Available at <http://www.asil.org> [Accessed 15 June 2009].

On September 23, 2003 Judge Mathew F. Kennelly of the US District Court ruled that Chinese President Jiang as head of state had immunity and an arrest warrant could not be issued against him¹⁸. Similarly, Justice Workman ruled that as a head of state, President Robert Mugabe is entitled to immunity while in office and cannot be liable to any form of arrest or detention.¹⁹ Both cases were lawsuits alleging serious human rights abuses in violations of the US Alien Act, the US Torture Victim Protection Act and international human rights norms.²⁰ On the other hand other heads of state are indicted even when still in office. Charles Taylor had his arrest warrant served to the Ghanaian government when he was in power attending an Economic Community of West African States (ECOWAS) meeting in Ghana. Also, the ICTY indicted Slobodan Milošević whilst he was still the head of State.²¹ Thus, this research will try to answer the question whether an International Criminal Tribunal/Court can indict, issue arrest warrants for, or prosecute a serving head of state.

1.3 Aim and Objective of the Study

With the case of Al-Bashir as a reference, the aim of this study is to clarify the overall structure of the present-day jurisdictional regime and the role of states in the enforcement of International criminal, humanitarian and human rights Law. In explaining the modern jurisdictional regime, this study illuminates the phenomenon referred to here as theoretical and practical enhancement in recognition, acceptance as well as the application of various bases of jurisdiction.²² Inazumi Mitsue considers this phenomenon to be instrumental in instigating the modern jurisdictional regime to depart from some traditional principles that dominated the classical jurisdictional regime.²³

An analysis of state immunity and universal jurisdiction constitutes the core of this study since universal jurisdiction is the most prominent jurisdictional basis upon which one can challenge the principle of state immunity.

¹⁸ *Does A-F v. Zemin*, 1:02-cv-07530, (2004) US District Court, Northern District of Illinois

See also *Wei Ye v. Zemin*, 383 F.3d 620, 2004 US App. LEXIS 18944 (7th Circ. Sept. 8, 2004)

¹⁹ *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (2001) SDNY.

See also *Tachiona v United States*, 386 F. 3d 2005, 2004 US App. LEXIS 20879 (2nd Circ. Oct. 6, 2004).

²⁰ Sarah (note 13).

²¹ Akande (note 10).

²² M Inazumi *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes under international law* (2005) 4.

²³ *Ibid*

This study has a practical value that matches its considerable intellectual interest in that, those who are injured by the acts of states are now more able and more willing than they have been in the past to challenge states or their officials in the courts.²⁴

1.4 Hypothesis and Research Questions

Punishing individuals responsible for gross and serious violations of human rights has been a complicated task and much so when such individuals enjoy the immunity reserved for some state officials. It is hypothesised that under international law, the applicability of the principles of immunity and universal jurisdiction seems to be paved with much difficulties, due to a number of factors, including, but not limited to, political, economic, and security interests. With the recent arrest warrant against Al-Bashir, this study seeks to answer the following questions:

1. How can the principles of immunity and universal jurisdiction be reconciled vis-à-vis the Al-Bashir case? What have been the state practices thus far, and why are they different? What implication may have, for example, the AU position on Al-Bashir's case under international law?
2. Is there a conflict of jurisdiction to the case of Al-Bashir? If yes what would be the better way of resolving such a conflict?
3. To what extent may Security Council Resolution 1593 be interpreted in regard to Al-Bashir's case? And how may state non party to the Rome statute help in implementing the arrest warrant against Al-Bashir? Do they have any obligation under international law?

1.5 Significance of the Study

Within the framework of the problem of international criminal justice, the ICC plays an incidental part, taking into account not only the tasks assigned to it by its Statute and the UNSC, but also because of the political disagreements over human rights. Indeed the role of

²⁴ VR Alebeek *The immunity of states and their officials in international criminal law and international human rights law* (2007). Available at <http://www.fds.oup.co.uk> [Accessed 25 June 2009].

the ICC is to intervene where states have failed to prosecute international crimes within its competence even it does not have competence as regards human rights.

Although there has been some progress in the establishment of international judicial institutions, this study will argue that there is no clarity on standards in use in these institutions. Thus, it may be feared that there may be contradictions both at national and international level in ways of responding to arising issues of criminal international law.²⁵ Furthermore, this study shows how international customary law is being applied differently by states due to diverging interests.

1.6 Literature Review of the Study

The topic of sovereign immunity is a vast subject in international law.²⁶ The problem related to immunity of heads of state from legal process and execution in criminal cases is a matter for international customary law. Heads of state enjoy total immunity from criminal legal process in foreign states for all acts that are normally punishable in these states. The principles of international law regarding jurisdictional immunities of states and their officials are mainly derived from the judicial practice of individual nation.²⁷ This review covers only opinions of some authors as a lot has been written on the subject.

According to Antonio Cassese²⁸, the traditional rule whereby state officials may not be held accountable for acts performed in the discharge of their official duties was significantly undermined after the Second World War, when international treaties and judicial decisions upheld the principle that this shield no longer protects senior state officials accused of international crimes.

Charles Pierson argues that an individual acting as head of state was granted immunity because, under state sovereignty, interference with the performance of their official duties was tantamount to interference with the affairs of that state. The essence of sovereignty is that there be no authority higher than the state (*pari in parem non-habet imperium*) thus,

²⁵ Mugemangango (note 1)4.

²⁶ M Maw *Recent trends in the principle of state immunity* (2006) 98. Available at <http://dspace.lib.niigata-u.ac.jp> [Accessed 10 June 2009].

²⁷ *Ibid*

²⁸ A Cassese *International criminal law* Second Edition (2008)305.

removing a leader from the state he/she governs, in order to prosecute him/her, is a breach by the prosecuting state to respect state sovereignty.²⁹

Moreover, Gerhard Werle argues that even if in international law, certain official acts and certain officials are granted immunity before foreign criminal courts, the fact that a perpetrator acts in his official capacity does not affect his/her criminal responsibilities.³⁰ Instead, the fact that the crime is committed in the exercise of sovereign functions is often an aggravating circumstance.³¹

The principle of state immunity is subject to qualification if a state expressly renounces the immunity and in civil law cases. In the former, a head of state may not claim immunity before foreign courts. Such immunity is limited to the duration of a head of state's official tenure. Specifically, the immunity of heads of state from legal process in civil matters does not meet with the same unanimity of opinion as in the case of criminal law. Accordingly, international crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are non-derogable and must be punished.³²

According to article 53 of The Vienna Convention on the Law of Treaties (1969)³³, crimes against humanity and the norms of international law that regulate them form part of *jus cogens* or fundamental binding norms which are peremptory norms recognized as general international law and cannot be modified or revoked by treaties or national laws.³⁴

According to Kaitlin R. O'Donnell³⁵, the potential scope of head of state's immunity has become a controversial issue in era in which war crimes, crimes against humanity, genocide, apartheid, aircraft seizure, hostage-taking, and torture have become the focus of increased media coverage. Although such acts are increasingly viewed as crimes permitting any country to assert universal jurisdiction over the perpetrator, there is a tension between the international community's desire to publicly condemn such acts by holding the perpetrator

²⁹ C Pierson 'Pinochet and the end of immunity: England's House of Lords holds that a former head of state is not immune for torture' (2000) 14 *TICLJ* 263 at 270.

³⁰ G Werle *Principles of international criminal law* (2005) 172.

³¹ Inazumi (note 22) 175.

³² MC Bassiouni 'International crimes: *jus cogens* and *obligatio erga omnes*' (1996) 59 4 *LCP* 63 at 66.

³³ Vienna Convention of the Law of Treaties (1969), 8 *ILM* 679.

³⁴ Article 53 of The Vienna Convention of the Law of Treaties (1969) states: *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*

³⁵ RK O'Donnell R. Kaitlin 'Certain criminal proceedings in France (Republic of Congo v France) and Head of State immunity: How impenetrable should the immunity veil remain?' (2008) 26 1 *BUIJLJ* 375 at 376.

responsible and such traditional international law concepts as state sovereign immunity. The commencement of investigations for international crimes during a head of state's tenure is a positive development in international law that promotes transparency of governmental action.

According to Abdul Ghafur Hamid *et al.*,³⁶ there are certain crimes under international law, which are so destructive of the international order and are contrary to the interests of the international community as a whole, that they are treated as international crimes (*delicti jure gentium*). Accordingly, since there exists a universal interest in repressing international crimes, states can exercise universal jurisdiction over perpetrators of such crimes. As a result, a serving head of state (or of government) should be protected from processes in order to enable them to carry out their duties efficiently and effectively. However, the most serious international crimes (such as genocide, war crimes and crimes against humanity) are *jus cogens* crimes founded on the peremptory norms of general international law from which no derogation is permitted.

According to Alhagi Marong³⁷, to fight impunity and to enforce the international community's interest in preventing and punishing such egregious violations of human rights, states have in the past resorted to international mechanisms of accountability, such as ad hoc tribunals or special courts. Now, the creation of the ICC as a permanent accountability mechanism for serious violations of international law by individuals obviates much of the need for such ad hoc institutions. Both state and individual responsibility must be pursued. Anything short of that would be to endorse impunity.

Chernor Jalloh and Alhagi Marong³⁸, stating what is provided for by the Rome Statute of the ICC argue that with jurisdictional complementarity to states, the ICC is premised, on the conviction that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

³⁶ A G Hamid and A Kadouf Hunud 'Immunity versus international crimes: the impact of Pinochet and Arrest Warrant cases' (2006) 46 4 *IJIL* 495 at 499.

³⁷ A Marong *Outlaws on camelback: State and individual responsibility for serious violations of international law in Darfur* (2007) 12.

³⁸ C Jalloh and A Marong 'Ending impunity: the case for war crimes trials in Liberia' (2005) 1 *AJLS* 53 at 72-3.

Additionally, Lee M. Caplan³⁹ argues that state and states actors' immunity is not an absolute right in the international legal order. Rather, as a fundamental matter, this immunity operates as an exception to the principle of adjudicatory jurisdiction. Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation.

According to Mark A. Summers⁴⁰, immunity of heads of states does not mean absolute inviolability from all judicial process of foreign and international courts. The exception to absolute immunity for core international crimes is a response to the attempt to the judicially punish the perpetrators.

1.7 Scope of the Study

This study concentrates on jurisdiction to prosecute and punish individuals for serious violations of human rights. The discussion is hereby limited to an examination of the immunity of heads of state as provided for in international law, relevant treaties, judicial decisions and works of eminent authors. As to the measures involving accountability for crimes, there are fact-finding measures established by investigatory organs. States may choose to pursue the accountability of individuals responsible for violations in combination with an acknowledgement of the truth through some commissions of inquiry.

This study is based on the recognition of the importance of pursuing individual criminal responsibility in enforcing international human rights law. It covers the principle of immunity and its application in international law. While other cases such as the case of Charles Taylor, the case of Augusto Pinochet and the Arrest warrant case may be referred to, the main reference is re the case of Al-Bashir and his Sudanese colleagues.

³⁹ ML Caplan 'State immunity, human rights, and *jus cogens*: a critique of the normative hierarchy theory' (2003) 97 4 *AJIL* 741 at 744.

⁴⁰ MA Summers 'Immunity or impunity? The potential effect of prosecutions of state officials for core international crimes in states like United States that are not parties to the Statute of the International Criminal Court' (2006) 31 1 *BJIL* 472 at 472.

1.8 Methodology of the Study

The methodological process that we chose in the development of this work is the research-action. This is largely a desk bound study which includes a detailed analysis of relevant international literature related to this topic.

Thus, this study is largely conducted on desk-research (The University of Cape Town Library and other universities' libraries I could access), based on previous literary works on the topic of heads of state criminal prosecution and the principle of state and state officials' immunity in international law.

Conventions, treaties and legislations on immunity and the prosecution of crimes of serious international crimes will be examined. The study will also consult human rights and humanitarian law; soft law as developed by reports of UN agencies; UN treaty bodies; resolutions of the UN General Assembly and Security Council as well as regional bodies; the case law of regional and international judicial bodies as well as domestic courts; the works of publicists of international law, international humanitarian law, international criminal law and transitional justice; journals and reports in relation with this topic; and internet sources. The Rome Statute of the ICC will be reviewed in detail, and its website is referred to at all times for the latest on-goings in the Darfur case before the Court.

1.9 Chapters Synopsis

This study is divided into four chapters. The choice of a plan with four chapters answers a preoccupation of harmonization of the ideas and especially with a coherence of analysis.

Chapter one is this introductory part. Chapter two discusses the doctrine and practical application of the principle of immunity of heads of state against criminal prosecution in international law. Chapter three explores the ICC prosecution in relation to the principles of universal jurisdiction and immunity from criminal prosecution. This involves the examination of the application of the principle of immunity by the ICC. Chapter four concludes the work and provides recommendations on the way forward.

CHAPTER II- DOCTRINE AND PRACTICAL APPLICATION OF THE PRINCIPLE OF IMMUNITY OF HEAD OF STATE FROM CRIMINAL PROSECUTION

2.1 Introduction

Immunity from prosecution in international law allows an accused to avoid prosecution for criminal offences.⁴¹ There are two types of immunities. The first is functional immunity, or immunity *ratione materiae*. This is an immunity granted to people who perform certain functions of state. The second is personal immunity or immunity *ratione personae* and is an immunity granted to certain officials because of the office they hold, rather than in relation to the act they have committed.⁴²

The law on immunity relates to the granting of immunities under international law to state actors to enable them effectively carrying out their official duties; with a view to secure the neat conduct of international relations. Although contemporary international law does not demand the courts of one state to refrain from deciding cases simply because a foreign state is unwilling defendant, there remains today a hard core of situations where a foreign state and its officials are entitled to immunity.⁴³

Both customary international law and treaty law recognize functional immunity. Functional immunity confers immunity on individuals performing acts of state (usually foreign officials). This type of immunity is based on respect for sovereign equality and state dignity. It protects conduct carried out on behalf of a State.⁴⁴ 'Any person who in performing an act of state and commits a criminal offence is immune from prosecution.'⁴⁵ Thus, it is a type of immunity limited to the acts to which it attaches (acts of state) but will only end if the state itself ceases to exist.⁴⁶

⁴¹I Brownlie *Principles of public international law* seventh edition (2008) 326.

⁴² *Ibid*

⁴³ F Hazel *The Law of State Immunity* 2nd Edition (2008) 2.

⁴⁴ R Cryer et al *An Introduction to International Criminal Law and Procedure* (2007) 423.

⁴⁵ *Ibid*

⁴⁶ Hazel (note 43) 668.

To sue a head of state effectively means suing the state itself and customary practice does not allow sue another nation. The contravention to this principle is the origin of some cases before ICJ like the Arrest warrant case, *Bosnia and Herzegovina v. Serbia and Montenegro*.⁴⁷

In *The Exchange v. MacFaddon* US Supreme Court Justice Marshal justified the doctrine of state immunity on the basis of the equality, independence and dignity of individual sovereign state when he stated that:

One sovereign being in respect amenable to the other, and being bound by the obligation of the highest character not to degrade the dignity of his nation, by placing him or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under express license or in the confidence that immunities belonging to his independent sovereign station, though not expressly stipulated, are reversed by implication, and will be extended to him.⁴⁸

Personal immunity is recognised under customary international law. In virtue of personal immunity, people holding a particular office enjoy immunity from civil, criminal, and administrative jurisdiction.⁴⁹ It provides complete immunity of the person of certain office-holders while they carry out important representative functions.⁵⁰ Under personal immunity, private residence, papers, correspondence, and property of an official enjoying personal immunities are inviolable.⁵¹

According to Cassese⁵², personal immunities are extended to cover personal activities of an official, including immunity from arrest and detention (though the host state may declare the person *persona non grata*), immunity from criminal jurisdiction, and immunity from the civil and administrative jurisdiction of the host state. Personal immunities cease with the cessation of the post.

Thus international customary law grants immunity from the judicial process only in respect of governmental activities that pertain to administration, and does not compel it in respect of

⁴⁷ Cryer *et al* (note 43).

⁴⁸ *The Schooner Exchange v. Macfaddon*, 7 Cranch 116(1812) US Supreme Court.

⁴⁹ Article 31 of the Vienna Convention on Diplomatic Relations (1961).

⁵⁰ According to article 37 of the Vienna Conventuion on Diplomatic Relations, this immunity is extended to diplomatic agents and their families while posted abroad and is also valid for their transfer to or from that post and, is only valid for the country to which they are posted.

⁵¹ Articles 27-30 of Vienna Convention on Diplomatic Relations (1961).

⁵² A Cassese *International Criminal Law* Second Edition (2008) 303.

other activities which are more commercial than administrative.⁵³ In this chapter, I will discuss the principle of heads of state immunity in respect of the need to prosecute serious violations of human rights in modern society.

2.2 International law and the principle of immunity of heads of state

The immunity of state or more accurately of those persons, who are considered the embodiment of the state, whether as sovereigns, diplomats, or some other state agency, is generally regarded as one of the oldest and most clearly established of all principles of international law. It is likely to enable the state, both symbolically and factually, to get rid of crimes.⁵⁴

2.2.1 Sources of Immunity of Heads of State

The concept of immunity in international criminal justice is as old as history itself. It is however important to discuss the principle of immunity in international criminal justice since, it raises controversial debate today than at any other period before. Initially, this concept was not an issue. Because it had little impact in both national and international criminal justice as internal regulations and rules bound all citizens including kings in spite of beliefs that kings were above the law.⁵⁵

Traditionally, immunity has been grounded in the principle of state sovereignty where heads of state are immune from criminal and civil prosecution by other nations. The practical justification for it is that immunity promotes respect among states and helps preserve the smooth functioning of international relations. Reciprocity is the key reason one state grants immunity to another, so that they in turn will respect the immunity of the forum state. Immunity is a result of state sovereignty. States were viewed as independent and interference with other states action was seen as sign of disrespect that would erode international relations.⁵⁶

⁵³DJ Harris *Cases and Materials on International Law* 6th Ed. (2004) 307.

⁵⁴Alebeek (note 24).

⁵⁵Tunks (note 1) 652.

⁵⁶Pierson (note 29)269-70.

See also Mugemangango (note 1)9.

International law governs states in their relationship establishing duties, rights and obligations they have to one another. The principal sources of international law are, those provided for in article 38 (1) of the Statute of the ICJ, namely international treaties and conventions, International customs, general principles of law recognised by civilised nations, judicial decisions and the writings of jurists as subsidiary means of determining the rules of law. In addition to what is provided for by this article, the Comity of Nations and *jus cogens* also help in shaping international law.

The principles and rules relating to immunity stem from international conventions.⁵⁷ These conventions include the 2004 UN Convention on State Immunity (UNSCI)⁵⁸, the 1926 Brussels Convention relating to the Immunity of State Owned Vessels of more restricted scope providing rules both as to immunity and liability for state ships in commercial use⁵⁹, and the regional 1972 European Convention on State Immunity.⁶⁰ In addition, there are bilateral agreements which contain rules for the contracting parties and may also provide evidence of state practice, although in the provisions of the latter the contracting parties may be seeking to avoid rather than confirm the legal position under general international law.⁶¹

Notwithstanding these conventions, the principal source of international law on state immunity is custom.⁶² The immunity of heads of state as well as the principle of sovereign immunity is a creature of international customary law. Customary practice was therefore not to sue another nation as suing a head of state meant suing the state itself. Sovereign nations were sovereign in their own right.⁶³ This was the position of US Supreme Court Justice Marshal in *The Schooner Exchange v. MacFaddon*.⁶⁴ In this case, he justified the doctrine of

⁵⁷ Hazel (note 43) 174.

⁵⁸ UN Convention on Jurisdictional Immunities of States and their Property (2004), G.A.O.R., 59th Sess., Supp. 22 (A/59/22).

⁵⁹ International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships (1926), *LNTS* (1937), No. 4062, p.200.

⁶⁰ European Convention on State immunity (1972), *ETS*, No. 74.

⁶¹ The 2004 UN Convention on Jurisdictional Immunities of State and their Property is the first general international convention containing the rules relating to State immunity and its officials. The law of state immunity provided for by this convention is comparable with the law relating to diplomatic and consular relations, which has been codified in the Vienna Convention on Consular Relations of 1963.

⁶² J Black-Branch 'Sovereign Immunity under International Law: The Case of Pinochet' in Woodhouse Diana *The Pinochet Case: A legal and constitutional analysis* (2000) 95.

⁶³ *Ibid*

⁶⁴ Cryer *et al* (note 47).

See Also Mugemangango (note 1) 11-12.

state immunity basing on equality, independence and dignity of individual sovereign states when he stated:

The jurisdiction of the nation within its own territory is necessary exclusive and absolute. It is susceptible of no limitation not imposed by itself. This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing him or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.⁶⁵

The Judiciary also plays an important role in shaping international law.⁶⁶ In *Marcos and Marcos v. The Federal Department of Police*⁶⁷ the Swiss courts stated that the privilege of immunity from criminal jurisdiction of heads of state has not been fully codified in the Vienna Convention [on Diplomatic Relations]. However, according to the Court, it cannot be concluded that the texts of the conventions drafted under the auspices of the United Nations grant a lesser protection to heads of foreign states than to the diplomatic representatives of the state which those heads of state lead or universally represent. Article 32 and 39 of the Vienna Convention must therefore apply by analogy to heads of state.⁶⁸

Therefore, a foreign sovereign being into another country cannot be made responsible for an act done in his sovereign character in his own country, be it a right act or wrong, effected by virtue of his sovereign authority abroad, supposed to be done in the exercise of his authority vested in him as sovereign.⁶⁹

In the *Hatch v. Baez*⁷⁰ where the plaintiff claimed to have suffered injuries in the Dominican Republic pursuant to acts done by the defendant in his official capacity for the Republic, the Court in New York noted:

⁶⁵ *Idem* at 96.

⁶⁶ Mugemangango (note 1) 12.

⁶⁷ Case (1989) 102 ILR 53, *Marcos and Marcos v. Federal Department of Police*, para 25, Swiss Supreme Court

⁶⁸ The breadth of this immunity was thus recognised by Swiss Supreme Court in 1989 in *Marcos v. Federal Department of Police*, where the United States sought bank documents for the purpose of a criminal prosecution against Ferdinand and Imelda Marcos, accused of corruption.

⁶⁹ King of Hanover case, (1848) 2 HL 1 cited by Mugemangango (note 1) 13.

⁷⁰ *Hatch v. Baez*, 7 Hun 596 (NY 1876), para 600; Also Mugemangango, *Ibid* 14.

But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognized in all the judicial decisions on the subject that have come to my knowledge..... The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individuals who did them, because they emanated from a foreign and friendly government.

These statements raise three important points under international law. First, heads of state are immune. Secondly, it does not matter whether or not the act is according to the constitution of that country and thirdly, it is irrelevant whether the act is right or wrong.

The writings of jurists are also included in the list of sources of state and its officials' immunity under article 38 (1) of the Statute of the ICJ. Through appraisal, academic writers indirectly influence the evolution of international law, as it crystallizes custom. There have been numerous writings by eminent authors and renowned jurists in support of immunity claims.⁷¹ The position of a former head of state as accepted in *Marcos and Marcos v. Federal department of Police* and in *Hatch v. Baez* continues to be cited as authoritative among jurists.

In the same vein, it was maintained by Sir Robert Jennings and Sir Arthur Watts that privileges relating to immunity are granted to a head of state as long as he is in office for official acts but may be sued for private acts.⁷²

Gore-Booth and Pakenham confirmed this point. In relation to the position of a visiting head of state, after considering the Vienna Convention on Diplomatic Relations 1961, New York Convention on Special Missions 1969 and European Convention on State Immunity 1972, the editors concluded:

The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple

⁷¹ Among others Cassese et al *The Oxford companion to international criminal justice* (2009)124; Cassese *International Criminal Law* 2nd edition (2008)303; A Cassese *International Criminal Law* (2003)267; I Browlie *Basic documents in international law* (2009)10; MC Bassiouni *International Criminal Law* (2008)130; F Hazel *The law of state immunity* (2008)677, JD Harris *Cases and materials on international Law* 6th edition (2004)307; M Inazumi *Universal jurisdiction in modern international law...* (2005)236; S Macendo *Universal jurisdiction...*(2005)120; G Mettraux *International crimes and the ad hoc tribunals* (2006); AW Schabas *Introduction to the International Criminal Court* 3rd edition (2007)80, Y Simbeye *Immunity and international criminal law* (2004)109-134; G Werle *Principles of international criminal law* (2005)172-178.

⁷² Sir R Jennings and Sir A Watts (eds) 'Oppenheim's international law' 9th Edition (1992) in D Woodhouse *The Pinochet Case: A legal and constitutional analysis* (2000) 99.

terms. He is entitled to immunity-probably without exception—from criminal and civil jurisdiction. He must of course disclose his position in order to claim privilege or immunity, but it is irrelevant that he may originally have entered the jurisdiction of another sovereign *incognito*.⁷³

For the case of a head of state who has been deposed or replaced or has abdicated or resigned and is no longer entitled to privileges or immunities as a head of state, authors further state that he/she will still be entitled to immunity in regard to acts he performed while head of state, provided that the acts were performed in his official capacity. This position is similar to that of any agent of the state.⁷⁴

As is argued by Sir Arthur Watts, a head of state's official acts, performed in his public capacity as head of state, are subject to different considerations. Such acts are acts of the state rather than the head of state's personal acts, and he cannot be sued for them even after he has ceased to be a head of state.⁷⁵

In this, an overriding principle of international law is the doctrine of *jus cogens* whereby a fundamental rule or principle (peremptory norm) in international law binds all states and does not allow any exceptions.⁷⁶ In recent years many authorities have agreed that laws prohibiting serious crimes, human rights abuses and international crimes are *jus cogens*.⁷⁷ In like manner, the principle of immunity is *jus cogens* on its own. Several learned writers and jurists affirm that immunity for heads of state is a well-recognised principle of international law, a peremptory norm widely accepted throughout the global community, in relation to official acts as head of state and continuing immunity probably without exception.⁷⁸

According to article 53 of the Vienna Convention of the Law of Treaties (1969) a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which

⁷³ L Gore-Booth and D Pakenham Satow's *guide to diplomatic practice* 5th Edition (1979) 9-10. See also Mugemangango (note 1) 14.

⁷⁴ *Ibid*

⁷⁵ Jennings and Watts (note 71) 100.

⁷⁶ Black-Branch (note 62) 100.

⁷⁷ *Ibid*, 101.

⁷⁸ *Supra* note 71.

can be modified only by a subsequent norm of general international law having the same character.⁷⁹

While it could be argued that holding those responsible, or allegedly responsible for serious violations of human rights should be an overriding principle of international law, which is above that of state immunity, it could alternatively be contended that the smooth working of international relations is a more pressing international concern. This formulates a long-standing principle of international law known as comity. The comity of nations is a recognition one nation allows within its territory to legislative, execute, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its citizens or of other persons who are under the protection of its law.⁸⁰ It operates on the basis that nations are willing to grant privileges, not as a right as such, but as a matter of good will, for the smooth functioning of international affairs.⁸¹

It is true that the principles of comity, as it pertains to heads of state, are even more fundamental to international law and politics than many others and thus must be respected. That is not to say that fostering good relations between, and among states may be more productive in long run. It is a principle applied only to heads and former heads of state. In the nature of things, there are few opportunities for any exceptions to the immunity of heads of state.⁸²

2.2.2 Theory and justification of the principle of immunity in international law

A State is a person of the international legal order, not of the system of domestic law where a litigant may seek to sue it. It is its function and purpose as a legal person which must shape the nature and extent of any protection from its proceedings afforded by a domestic court to a foreign state.⁸³ Accordingly, the principle of immunity is one illustration of general thesis that both the theory and the doctrine of international law produce opposing positions of

⁷⁹ Article 53 Vienna Convention of the Law of Treaties.

⁸⁰ AB Garner (ed) *Black's Law Dictionary*, 7th Edition (1999) 261-2.

⁸¹ *Ibid*

⁸² Cryer *et al* (note 47).

⁸³ Hazel (note 43) 41.

concreteness and normativity, a conceptual opposition in which it is impossible to prioritize one term over another.⁸⁴

Head of state immunity like state immunity itself is designed to give effect to communal solidarity between states and safeguard their rights of independence and self-determination. One rationale for exemption of foreign head of state from the territorial state's jurisdiction as initially articulated was respect for the foreign state's autonomy (sovereignty, dignity and independence). The opposing *rationale* was the safeguarding of the territorial state's equal autonomy. The problem relating to immunity cannot be solved by stressing sovereignty as two sovereigns are in issue and it is the manner of their relationship which is the debated question of law.⁸⁵

Therefore, the conjunction of the two autonomies is shown by serving community as well as state autonomy purposes, by ensuring equal respect for both foreign and territorial states, and the progress towards the goal of establishing the rule of law among nations is achieved. Practically, however, this conjunction, or conceptual opposition, products great uncertainty as either *rationale* can be used to justify a decision for or against the foreign state's official. The standard way to establish the needed balance between the conflicting sovereignties is to make use of the distinction between the foreign sovereign's public and private acts. However, this tends to be unhelpful because the distinction and the way it is applied rest on political assumptions as to the proper sphere of state activities and of priorities in state policies which cannot easily be contained in formal rules.⁸⁶

Traditionally, under the original view of head of state immunity, heads of state were not criminally accountable for their actions because one sovereign could not be subject to another sovereign's jurisdiction, and because the effective functioning of interstate relations required transborder movement. Eventually, the identification of the state with its chief executive faded, in part because in the nineteenth and twentieth centuries many states increasingly

⁸⁴ The exercise of public powers, as opposed to the engagement in private relationships, has been a constant theme in political theory and is used as a justification in many branches of the law other than that relating to immunity.

⁸⁵ Hazel (note 43) 48-9. In fact issuing a foreign head of state in a domestic court would lead to a conflict between concerned states as far as a head of state enjoys absolute immunity in his/her own state.

⁸⁶ *Ibid* 50.

participated in commercial affairs.⁸⁷ International lawyers distinguished between acts *jure imperii*, official acts of State, to which they continued to afford immunity, and acts *jure gestionis*, commercial or private acts, to which they sometimes did not. This transformation has led to controversial assertions of both criminal and civil jurisdiction over heads of state.⁸⁸

The development of the doctrine of heads of state immunity is relatively recent and derived from the evolution of state immunity. Beginning in the post World War II era, the doctrine of head of state immunity underwent a transformation and came to resemble more closely the doctrine of diplomatic immunity and absolute immunity became restrictive immunity.⁸⁹

Political and legal justification of head of state immunity seems little point in rules relating to immunity unless they are supported by convincing reasons of policy. On the basis of common characteristics and values identified above, three main grounds are given for the grant of immunity to foreign heads of state. First, that national courts have no power of enforcement of their judgements against a foreign head of state; secondly, that the independence and equality of states prevent the exercise of jurisdiction by the courts of one state over the person, acts, or property of another state; and finally, that foreign heads of state ought properly to enjoy a like immunity to that accorded by national courts to their own forum heads of state.⁹⁰

The court's inability to enforce its judgements against a foreign head of state remains the outstanding reason for the retention of immunity, as demonstrated by the fact that a separate immunity from execution is afforded to state and largely remains an absolute bar on enforcement of judgements against state's officials. This inability is partly legal and partly factual. The application by one state of forcible measures of constraints against the conduct or state officials of another state is an unfriendly act generally prohibited by international law, except where that state has itself contravened international law.⁹¹

⁸⁷ Kaitlin (note 35) 376-7.

⁸⁸ K C O'Neill 'Note, a new customary law of Head of State immunity?: Hirohito and Pinochet' (2002) 38 *SJIL* 289 at 292.

⁸⁹ Caplan (note 39) 114-117.

⁹⁰ C Forcese 'De-immunizing torture: reconciling human rights and State immunity' (2007) 52 *MGLJ* 127 at 131-132.

⁹¹ *Idem* at 133.

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⁸⁸ K C O'Neill 'Note, a new customary law of Head of State immunity?: Hirohito and Pinochet' (2002) 38 *SJIL* 289 at 292.

⁸⁹ Caplan (note 39) 114-117.

⁹⁰ C Forcese 'De-immunizing torture: reconciling human rights and State immunity' (2007) 52 *MGLJ* 127 at 131-132.

⁹¹ *Idem* at 133.

Forcese⁹² further argues that the basis for the rule of absolute immunity for heads of state therefore derives legally from the rule of non-intervention in the internal conduct of the state's public functions, and factually, from the practical impossibility of forcing a state to do what a court may order. It cannot be ignored that lack of means of forcible enforcement remains the underlying political obstacle and hence the justification for a legal plea that avoids forcible confrontation between states. Even where enforcement is legally possible, the political consequences to the friendly relations of the forum state with the foreign state may discourage the forum state's support for such enforcement.⁹³

The independence and equality of States recognizes this political reality, and gives it expression in legal terms as the lack of competence of one state to exercise jurisdiction over another state's officials. Independence provides a justification for the absolute rule of immunity, and remains a justification for the restrictive rule which restrains the forum state from adjudicating acts in the exercise of sovereign power, *jure imperii*, of another State. Inherent in the recognition of the foreign state's independence is an acknowledgement that it alone is responsible for the determination of its policy and conduct of its public administration, and that courts should refrain from hampering the foreign heads of state in the achievement of these purposes.⁹⁴

However, the justification for heads of state immunity as considered above views the doctrine from the position of the state, either as an international person entitled to equality and independence, or as a constraint on the forum state's entitlement to exercise jurisdiction. Independence and equality taken literally are not in fact observed in the operation of any rule of immunity. The source of this independence as ground for immunity, as well as the source of the concept of the sovereign equality of states, is the rule, still pertaining in international law, that there can be no independent settlement in case of disputes without the states' consent. In terms of its political and institutional validity, immunity is justified on ground that

⁹² *Ibid*

⁹³ Political and diplomatic interests are prioritized over legal obligations. Like in Al-Bashir case, even certain countries like Tanzania alleging that they are ready to cooperate with the ICC, they seem having adopted the position of advising Al-Bashir to surrender to the Court instead of accepting to arrest him.

⁹⁴ Hazel (note 40) 58-9.

it provides a mechanism for the allocation of jurisdictions between states' courts in accordance with the requirements of international law relating to immunity.⁹⁵

2.2.3 Analysis of acts of head of state in respect to the scope of immunity

The principle of head of state immunity originally developed from the idea of state sovereign immunity, as the state and its ruler were deemed as one. Yet the treatment afforded to heads of state and other top state officials has also been strongly influenced by the principle of diplomatic immunity, and the three concepts have by now evolved into doctrines wholly distinct from one another. Nevertheless, to understand the dramatic recent changes in the law of head-of-state immunity, it is essential to examine these closely related doctrines from which the idea of head-of-state immunity descended, and to explore their underlying rationales.⁹⁶

The potential scope of a head of state's immunity has become a controversial issue in an era in which war crimes, crimes against humanity, genocide, apartheid, aircraft seizure, hostage-taking, and torture become the focus of increased media coverage repetitions. Although such acts are increasingly viewed as crimes permitting any country to assert universal jurisdiction over the perpetrator, there is a tension between the international community's desire to publicly condemn such acts by holding the perpetrator responsible and such traditional international law concepts as state sovereign immunity.⁹⁷

One may wish to know what are official acts in the exercise of functions of a head of state since such acts may be different from one country to another due to their respective constitutions, their geographical locations in the world and their unique relations with other states.⁹⁸

If today there is a concerted world movement to eradicate these types of abuses, the whole world community, especially the United Nations, should deal with them decisively and agree to institute clear legislation with enforcement mechanisms. The reality is that a head of state

⁹⁵ While the Vienna Convention on Diplomatic Relations provides for diplomatic immunity, the immunity of heads of states is a product of customary international law.

⁹⁶ Tunks (note 1) 652.

⁹⁷ Kaitlin (note 35) 376.

⁹⁸ See Mugemangango (note 1) 17. While there is a doubt that the world would be a better place if acts that constitute serious violations of human rights were eradicated, it is difficult to determine whether certain acts of state, which amounts to this type of actions, are legitimate within the political in a given state, at a given time.

can commit a crime in his personal capacity. He/she can engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the conduct was engaged in under colour of or in ostensible exercise of head of state's public authority. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other states whether or not it was wrongful or illegal under the law of his/her own state.⁹⁹

In the Pinochet case the court accepted that in relation to the repression alleged, the plans and the instruction established before hand from the government enabled these actions to be carried out. In this sense, Pinochet as Commander-in-chief of the Armed Forces and head of the Chilean Government vicariously committed the punishable acts. This provides that the acts in question were undertaken as part of Pinochet's function when he was head of state, and consequently, expunges his right to immunity.¹⁰⁰

In recent years, acts of heads of state qualified as crimes have been challenged, since Nuremberg to ICC, through different international tribunals. From the Nuremberg Principles¹⁰¹ to the Vienna Convention on Diplomatic Relation 1961, the scale of destruction necessitated changes in the international community against state sponsored abuse. At the end of World War I the Allies found that the central power had committed numerous acts in violation of established laws and custom of war and the elementary laws of humanity. They then inserted in the Versailles Treaty articles providing for punishment of persons accused of violating the laws and custom of war.¹⁰²

⁹⁹ Hamid (note 36) 109.

¹⁰⁰ *Ibid*

See also Mugemangango (note 1) 17-18.

¹⁰¹ The Nuremberg Principles were a set of guidelines for determining what constitutes a war crime. The document was created by the International Law Commission of the United Nations to recognize the legal principles underlying the Nuremberg Trials of Nazi party members following the World War II. They are about 7 and read as follows: (I) *'Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment'*. (II) *'The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.'* (III) *'The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible government official does not relieve him from responsibility under international law.'* (IV) *'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him.'* (V) *'Any person charged with a crime under international law has the right to fair trial on the facts and law.'* (VI) *'The crimes hereinafter set out are punishable as crimes under international law: crimes against peace, war crimes and crimes against humanity.'* (VII) *'Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law'*.

¹⁰² Articles 228-230 of the Treaty of Peace (1919).

Accountability of state officials derives from the emergence in customary international law of provisions based on the consciousness that certain acts (international crimes of individuals) cannot be considered as legitimate performance of official functions. In the judgement of Nuremberg Military Tribunal (IMT) it was stated that the principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.¹⁰³ This principle was enshrined in article 27 of the Versailles Treaty, whereby the Allied Powers publicly arraigned the former German Emperor, for a supreme offence against international morality and the holiness of treaties.¹⁰⁴

The IMT eliminated the defence of superior orders, command of law, and act of State immunity, thereby subjecting even heads of state to criminal liability. This principle was included in the Charter of Tokyo Tribunal¹⁰⁵, in control council law no 10¹⁰⁶, the latter of which governed the prosecutions of prominent Nazi before the IMT. The same principle is now contained in Article 7 of the ICTY Statute, Article 6 of the ICTR Statute, and in Article 27 of the ICC Statute. The sensitivity of the matter no doubt stemmed from the Nuremberg jurisprudence that waived even the well-established principle of immunity for a head of state.¹⁰⁷

In 1993, the ICTY was given power to prosecute persons responsible for serious violations of international humanitarian law, including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages, genocide, crimes against humanity, when committed in armed conflict whether international or internal in character, and directed against any civilian population. The ICTY held that sovereign rights of states cannot and should not take precedence over the right of the international community to act appropriately as crimes against humanity affect the whole of mankind and shock the conscience of all nations of the world.¹⁰⁸

¹⁰³ Article 7 of the IMT Charter provides 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*'.

¹⁰⁴ BB Ferencz 'A Nuremberg Prosecutor's response to Henry Kissinger' (2001) 95 *AJIL* 124 at 124. See also Mugemangango (note 1) 18.

¹⁰⁵ Article 5 Charter of the Women's International Tribunal on Japan's Military Sexual Slavery (2000).

¹⁰⁶ Article II (2) of the Control Council Law No. 10(1945), Nuremberg Trial Proceedings Vol. 1.

¹⁰⁷ H Donnedieu de Vabres 'The Nuremberg trial and the modern principles of international criminal law' in G Mettraux(ed) *Perspectives on the Nuremberg trial* (2008) 213 at 214. See also Mugemangango, *Ibid*

¹⁰⁸ Case No. IT-94-1-A *Prosecutor v. Tadic* (1995) ICTY. See also Mugemangango, *Ibid*

There is thus no doubt that the world has been moving towards the recognition of the principle that the principle of immunity is voided by international crimes which should not be covered by claims of states or heads of state or other officials when charges are brought before international courts/tribunals. In *The Prosecutor v Jean Kambanda*¹⁰⁹, the function of Jean Kambanda as former Prime Minister of Rwanda and questions relating to any immunity thereto were not even examined by the tribunal. According to Article 27 of the Rome Statute of ICC, official capacity as head of state or government shall not in any case exempt the person from criminal responsibility. Although it is concerned with jurisdiction, it does indicate the limits, which states were prepared to impose in this area on the tribunal.

2.3 The practical applicability of the principle of head of state immunity

Both heads of state and heads of government, by reason of the ceremonial or political functions which they exercise on behalf of the state, are treated as a 'state', which enjoys immunity under international law. The position of a head of state in terms of immunity can be equated to that of a head of government. Until recently, a rule of absolute immunity for heads of state from civil and criminal proceedings in national courts has generally been accepted in practice in all major jurisdictions.¹¹⁰ However, as is discussed above, contemporary trends have proved the contrary as heads of state have been subjected to criminal prosecutions before different tribunals or courts.

2.3.1 Head of state immunity from criminal prosecution

The immunity of state officials from foreign criminal jurisdiction has begun to attract greater attention. This is connected to a large extent with the growth of the concept of protection of human rights, a decline in willingness to tolerate gross violations of human rights, and efforts to combat terrorism, transnational crimes, corruption and money laundering. The international community no longer condones impunity on the part of those who commit these crimes, whatever their official position in the state. At the same time, it can hardly be doubted that immunity of state officials is indispensable to keep stable inter-state relations.¹¹¹

¹⁰⁹ Case No.: ICTR 97-23-S *The Prosecutor v. Jean Kambanda* (1998) ICTR.

¹¹⁰ Hamid (note 33) 498.

¹¹¹ AR Kolodin *Immunity of State officials from foreign criminal jurisdiction* at 436. Available at <http://citeseerx.ist.psu.edu> [Accessed 30 June 2009].

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Originally, before the human rights issue became topical, the problem of the immunity of a state, its representatives or property arose from the conflict between the rights of such a state stemming from the principle of sovereign equality of states, and the rights of the state on whose territory these representatives or property were located, stemming from the principle of the full territorial jurisdiction of the latter.¹¹²

Head of state immunity is grounded in the notion that states must respect other states' internal organisation and may not therefore interfere with the structure of foreign states or allegiance a state official may owe to his own state. Hence no state agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state.¹¹³

The offices usually recognized as attracting this immunity are head of state or head of government, senior cabinet members, foreign minister, and minister for defence. Such officers are immune from prosecution for acts committed during their time in office.¹¹⁴ However, the moment the accused leaves office, he/she is liable to be prosecuted for crimes committed before or after his/her term in office, or for crimes committed whilst in office in a personal capacity (subject to jurisdictional requirements and local law). Pinochet was only able to come to trial because Chile and the UK had both signed and ratified the UN Convention against Torture through which such immunities were waived and Spain has applied for his extradition when he was in London for medical treatment.¹¹⁵

The recent experience indicates that personal immunity is losing its relevance in international law. As has been ruled by the Chamber of Appeals of the Special Court for Sierra Leone in 2004 Charles Taylor could not adduce immunity albeit his being an incumbent head of State at the time of his indictment.¹¹⁶ As such, he claimed entitlement to the benefit of any immunity asserted by that state against exercise of the jurisdiction of the

¹¹² *Idem* at 438.

¹¹³ Cassese (note 52) 303.

¹¹⁴ See the Arrest Warrant Case and Pinochet Case.

¹¹⁵ Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that no exceptional circumstances whatsoever may be invoked as a justification of torture.

¹¹⁶ This reasoning was based on the construction of the court's constituent statute which dealt with the matter of indicting state officials. At the time of his indictment, (7 March 2003) and of its communication to the authorities in Ghana (23 July 2003), Charles Taylor was an incumbent head of state.

Court. But article 6(2) of the Statute of the Court makes it clear that the question of immunity cannot be raised in this case.¹¹⁷

As for the development made thus far under international law, immunity is no defence to prosecution. It is rather a procedural bar to jurisdiction action and does not negate the material or mental elements of the crime like a defence. This may be seen in the recent case laws of the jurisprudence of the ICTY, particularly in *Prosecutor v. Karadžić*¹¹⁸, *Prosecutor v. Milošević*¹¹⁹, and *Prosecutor v. Furundžija*¹²⁰ cases. A number of reasons account for such a stand: genocide, war crimes and crimes against humanity are not acts of state since criminal acts in question are committed by humans; and immunity can not allow derogations from the *jus cogens* nature of international crimes.

However, in Arrest warrant case, the final judgment of the ICJ regarding immunity may have thrown the existence of such a rule limiting functional immunities into doubt though Judge Van Den Wyngaert supported it in his dissenting opinion.¹²¹ She strongly criticised the majority for equating the rationale for the immunities of foreign ministers with immunities of diplomats and heads of state.

In requesting the ICJ to declare that Belgium should annul the international arrest warrant issued on 11 April 2000, Congo indirectly challenged the legality in which the principle of universal jurisdiction is embedded. The central legal questions the Court had to examine with regard to immunities were (1) to what extent a Minister for Foreign Affairs is entitled to immunity under international law, and (2) whether that immunity extends to universally condemned international crimes such as war crimes and crimes against humanity.¹²²

In its judgment, the ICJ emphasises that immunity from jurisdiction enjoyed by incumbent ministers for foreign affairs does not mean that they enjoy impunity since the immunities do

¹¹⁷ This article provides that 'the official position of any accused persons, whether as head of state or government or as responsible government official, shall not relieve such a person of criminal responsibility nor mitigate punishment'.

¹¹⁸ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-I (2009) ICTY.

¹¹⁹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T (2007) ICTY.

¹²⁰ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T (1998) ICTY.

¹²¹ Arrest Warrant Case, (*DRC v. Belgium* (2000) ICJ) para 78. She said that 'there is no rule of customary international law granting immunity to incumbent foreign ministers from criminal process suspected of war crimes and crimes against humanity (...)'.
¹²² Arrest warrant case, para 35.

not prohibit criminal prosecution in certain circumstances.¹²³ It supports this view by stating that ministers for foreign affairs can still be prosecuted for their acts in their own countries or in foreign countries if the state which they represent or have represented waives their immunity.¹²⁴ This is probably the most controversial statement of the whole judgement. Whether former ministers can be prosecuted for international crimes committed during their period of office thus depends, according to the ICJ, on the question whether such international crimes can ever be qualified as 'private acts' rather than as 'official acts'.

Unfortunately, the Court does not answer this crucial question. In legal writings this argument regarding claims based on the idea that a senior state official committing international crimes can never be said to be acting officially, however, is not waterproof since it ignores the sad reality that in most cases those crimes are precisely committed by or with the support of high-ranking officials as part of a state's policy, and thus can fall within the scope of official acts.¹²⁵ In a strict reading, the Court's view could confront us with the peculiar and unacceptable fact that precisely the most serious crimes would not be subject to prosecution even after a person has ceased to hold office, and that immunity would indeed lead to impunity.

Therefore, we cannot but regret that the Court used the ambiguous and controversial criterion of 'official/private acts' instead of recognizing an exception to the granting of immunities to former Ministers in case of international crimes. Moreover, the argument of the importance of the unhindered conduct of international relations to grant immunities can no longer be invoked in the case of former Ministers. Finally, it is interesting to note that four of the Judges, while voting with the majority, express serious reservations concerning this paragraph.¹²⁶

¹²³ Arrest Warrant Case, para 60.

¹²⁴ *Idem*, para 61.

¹²⁵ Among others G Werle *Principles of international criminal Law* (2005) 178; A Cassese *International criminal law* 2nd edition (2008) 305; L N Sadat and M P Schraf (eds) *The theory and practice of international criminal law: Essays in honor of M C Bassiouni* (2008) 128; M C Bassiouni *International criminal law* 3rd edition Vol. II (2008) 142-143; I Brownlie *Principles of public international law* 7th edition (2008) 330; etc.

¹²⁶ Arrest Warrant Case, Joint opinion, para 78; Arrest Warrant Case, Dissenting Opinion Judge Al-Khasawneh, paras 5-8 and Arrest Warrant Case, Dissenting Opinion Judge *ad hoc* Van den Wyngaert, paras 34-38.

The principle of immunity is not for the official's personal benefit but is based on the need for states to function effectively and hence not be deprived of their most important officials. It is predicated on the need to avoid a foreign state either infringing sovereign prerogative of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act (*ne impediatur legatio*, i.e. the immunities are granted to avoid obstacles to the discharge of diplomatic functions)¹²⁷.

2.3.2 Historical overview of the waiver of head of state immunity

Waiver of immunity means the act of giving up the right against self-incrimination and proceeding to testify.¹²⁸ Waiver may occur, *inter alia*, in treaty, in a diplomatic communication, or by actual submission to proceedings in the local courts. Waiver may be express or implied.¹²⁹ A state can waive immunity by its consent and submit it in accordance with the rule prescribed by legislation. But in commercial matters, a state or government waives immunity when they have made a contract with partner as relinquishment of state immunity by submitting their consent.¹³⁰

In *Aquinda v. Texaco*¹³¹ the Southern New York District Court declared that to establish waiver, there must be a clear, complete, unambiguous and unmistakable manifestation of a sovereign's intent to waive its immunity. The same in *Princz v. Federal Republic of German*¹³², the District Court stated that to find implied waiver, there must be some manifestation of the state's intent and that waiver would not be found absent a conscious decision to take part in the litigation.

The issue of waivers is applicable to all who ordinarily enjoy immunity in foreign jurisdictions. A waiver is the permission given by the state of the individual concerned, authorising the state with custodial enforcement jurisdiction to proceed with investigation, arrest or trial of the individual concerned. Waivers have, in most cases, been the subject of

¹²⁷ Alebeek (note 24).

¹²⁸ Forcese (note 90) 157.

¹²⁹ Dickinson A *et al State immunity: selected materials and commentary* (2004) 247.

¹³⁰ Kaitlin (note 35) 442.

¹³¹ *Aquinda v. Texaco*, 175 FRD 50, 52 (SDNY 1997) paras 153 and 157.

¹³² *Princz v. Federal Republic of Germany*, 26 F 3d 1116, 1174 (DC Cir 1994), para 243.

much debate with regard to diplomats and less with heads of state and government, perhaps because waivers have been clearly provided for in the Vienna Diplomatic Convention.¹³³

The fundamental rule of international law that heads of state and public officials may be held individually responsible for crimes against humanity has been long established and it was widely accepted before the adoption of the Nuremberg Charter on 8 August 1945 that heads of state could be held criminally responsible for crimes under international law.¹³⁴

Accordingly, a head of state who commits grave crimes can be charged. This principle was included in the Versailles Treaty before the Nuremberg Charter.¹³⁵ This is the legal basis for trial of persons accused of crimes of serious violations of human rights. Thus, nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability.

The Nuremberg IMT declared that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes, can the provisions of international law be enforced'.¹³⁶ It concluded that state immunities do not apply to crimes under international law. When the act in question is an act of State, those who carry it out are responsible. The principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts, which are condemned criminally by international law.¹³⁷ The authors of these acts cannot shelter themselves behind official positions in order to avoid punishment in appropriate proceedings.

It is important that state officials, and first and foremost senior state officials, who have committed crimes, especially massive and gross violations of human rights or international humanitarian law, should bear responsibility, including criminal responsibility. It is important that, where the rights of its nationals have been violated by criminal acts, a state should be

¹³³ Y Simbeye *Immunity and International Criminal Law* (2004) 136.

¹³⁴ CG Fenwick(ed) 'Notes on international affairs: the legal liability of the Kaiser' (1919) 13 1 *APSR* 120 at 126.

¹³⁵ According to Article 227 of the Versailles Treaty (1919), grave charges, including crimes against humanity, in the hierarchy of persons in the authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal.

¹³⁶ Judgement of the Nuremberg Military Tribunal (1946) 41 IMT, para 41 Nuremberg trial records and documents, ca 1945-1946.

¹³⁷ *Ibid* para 42.

able to exercise its criminal jurisdiction in respect of suspected perpetrators. However, it is also crucially important that inter-state relations based on generally recognized principles of international law, and in particular the principle of the sovereign equality of states, should be stable and predictable, and, correspondingly, that officials acting on behalf of their states should be independent *vis-à-vis* other states.

It is obvious that it is not the official but state which has the right to waive his or her immunity. The question concerns which organ of state (which law is applicable in determining it- domestic or international) and in what manner the State has the right to waive the immunity of its official (explicit waiver, implied waiver, *ad hoc* waiver, waiver of a general nature, for example, through the conclusion of an international treaty, etc.). As article 98 of Rome Statute of the ICC requires consent or waiver, the individual may never be apprehended during his term in office, as his/her immunity *ratione personae* will be absolute until his term in office ends.

2.3.4 Critical analysis over the principle of immunity in international law

The principle of immunity of heads of state against prosecution before the courts which is granted by international customary law is well established both in national and international law.¹³⁸ The tension between the protection of human rights and the demand of state sovereignty is reflected in the debate on whether state officials should be held responsible for international crimes committed while in office. This debate involves the interplay between the well-established law according immunities to the State and its agents from the jurisdiction of other States and the new principles of international law that are based on humanitarian values.¹³⁹ In 2002, the ICJ in the Arrest Warrant case stepped in to resolve the debate, providing a relatively clear and authoritative framework for deciding head-of-state immunity cases under international law.¹⁴⁰

Although the move away from absolute to restricted immunity is now well established in accepting the decisions of courts of many states, state practice does not suggest that sovereign

¹³⁸ Ferencz (note 104) 134.

¹³⁹ Akande (note 10).

¹⁴⁰ Arrest Warrant Case (*DRC v. Belgium*) ICJ.

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immunity should be abolished altogether. In *Rahimtoola v Nizam of Hyderabad*¹⁴¹, Sir Denning states that:

It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than arbitrarily rejecting their jurisdiction. In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts;[...]. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them.¹⁴²

However, it is clear that some political interests constitute a great obstacle to the prosecution of heads of state. In a criminal complaint against Hissène Habré, former President of Tchad brought in Senegal for international crimes committed when he was ruling Tchad, the judges asserted that Senegalese courts had no competence over crimes committed outside Senegal by a foreigner and upheld the final dismissal ruling on March 20, 2001.¹⁴³

In 1999, the South African Government refused to arrest Mengistu Haile Mariam, former Ethiopian tyrant knowing that there is an international arrest warrant against him issued by Ethiopian Government for serious crimes committed by his regime. Instead, a foreign Ministry official argued that Africans cannot be seen to be arresting fellow Africans on the basis of law of tenuous status. Zimbabwe has also received an extradition request from Ethiopian Government but has refused to act because of the absence of a treaty between countries even if Ethiopia argued that Mengistu's crimes are such that the absence of a treaty should not stop extradition.¹⁴⁴

The Danish Centre for rehabilitation of victims of torture lobbied French authorities to get Mugabe arrested during a visit to France in 2002 citing article 6 of Convention against Torture but the French authorities did not act until Mugabe left for Zimbabwe before they replied saying that he is out of their jurisdiction.¹⁴⁵

¹⁴¹ *Rahimtoola v Nizam of Hyderabad* [1958] A.C.379 at 418, PC.

¹⁴² *Ibid*

¹⁴³ Questions relating to the obligation to prosecute or extradite, *Belgium v. Senegal* (2009) ICJ at para.74.

¹⁴⁴ BBC News of 8 December, 1999, 16 GMT. Available at <http://news.bbc.co.uk/1/hi/world/africa/555304.stm> [Accessed on 15 May 2009].

¹⁴⁵ Simbeye (note 133) 110-3. See also Mugengango (note 1)32.

In March, 2001, France's highest court, the Cour de Cassation, held that Libyan Head of State Muammar al-Ghaddafi was entitled to immunity in a suit alleging that Ghaddafi was responsible for bombing a French DC-10 aircraft in an attack that killed 170 people. The decision reversed a lower court ruling that had refused to recognise the sitting Libyan leader's head-of-state immunity.¹⁴⁶

In November 2007, French prosecutors refused to press charges against former US Secretary of Defence Donald Rumsfeld for torture and other alleged crimes committed during the course of the US invasion of Iraq, on the grounds that high ranking state officials enjoyed official immunity under customary international law, and they further claimed that the immunity exists after the official has left office.¹⁴⁷

In 2002, the ICJ confirmed immunities of incumbent ministers of foreign affairs in the arrest warrant case. Considering the justifications for head of state immunity doctrine and recent state practice, the ICJ declared that it has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs.¹⁴⁸

On the contrary, in the *Pinochet case* British police immediately executed the arrest warrant sent by Spain, and Britain's Home Secretary Jack Straw then twice decided to allow Spain's extradition bid to proceed after the House of Lord's decision for the third time. Straw subsequently ordered his release and allowed him to go home allegedly for health reasons.¹⁴⁹

Furthermore, even though some international agreements have called for stripping away head-of-state immunity, and although some countries have considered taking jurisdiction over foreign leaders, it is significant that no nation has yet gone so far as to actually pass judgement against a sitting head of state. Among of reasons for this international behaviour is the fact that, the application of this accepted norm through universal jurisdiction has not freed from political influence.

¹⁴⁶S Zappala *Do Heads of States in office enjoy immunity from prosecution for international crimes? Ghaddafi case before French Cour de Cassation*. Available at <http://www.sos.attentats.org> [Accessed 30 June 2009].

¹⁴⁷ *Ibid*

¹⁴⁸ Arrest Warrant Case, para 60.

¹⁴⁹ *R. v Bow Street Metro. Stipendiary Magistrate Ex parte Pinochet*, [2000] 1 A.C. 61 (H.L.) para 85.

It is interesting to note that while other jurisdictions deny immunity of heads of state there is no international legal and political plane which altered the traditional application of sovereign equality and head of state immunity of heads of state. There is, however, practice in some national courts which have attempted to interpret these principles based on development of international law although they have reached different conclusions in some cases. It seems that there's stability in legal developments insofar as sitting or incumbent heads of state with respect to the most serious international crimes.

The international customary law is the only source of law providing consensus on clarification or ways of altering head-of-state immunity law. When inferring rules of customary law from conduct, it is necessary to examine the attitude of states. A sitting head of state, as the holder of the highest office and representative of his state, is immune from legal suit in a foreign court.¹⁵⁰ International custom is recognised as one source of international law as per article 38 of the Statute of the ICJ. In order to form customary international law, states must act with the belief that their actions, rendered obligatory by the existence of a rule of requiring it, and are not motivated only by considerations of courtesy, convenience or tradition.¹⁵¹

Therefore, to monitor the development of the customary law of head-of-state immunity, one should analyse how national and international courts have addressed recent immunity questions, how states have reacted to these decisions, what actions political branches have taken with respect to immunity issues, and any general statements nations have made about the degree of immunity enjoyed by heads of state.¹⁵²

The same development has also indicated double standards in application of international law. For example, while Noriega was denied immunity as head of state, the United States Government has consistently recognised ousted head of states as legally head of state even without effective control of the nation. Similarly, Haiti's President Jean-Bertrand Aristide was ousted in a military coup in 1991, but the United States continued to recognize him as Haiti's legitimate head of state.¹⁵³ Accordingly, in *Jane Does v. Emmanuel Constant*¹⁵⁴, a federal district court sitting in New York dismissed a lawsuit against Aristide that had accused him of orchestrating a political assassination, relying on the concept that Aristide enjoyed head of state immunity under American law.

¹⁵⁰ Simbeye (note 133) 94.

¹⁵¹ Mugemangango (note 1)33.

¹⁵² *Ibid* 34.

¹⁵³ *Ibid*

¹⁵⁴ *Case No. : 04-CV-10108 (SHS) USDC-SDNY Jane Doe I, Jane Doe II and Jane Doe III, Plaintiffs v. Emmanuel Constant, a.k.a. Toto Constant, Defendant.* Available at <http://www.cja.org> [Accessed 10 May 2009].

2.5 Concluding Remarks

This chapter has elaborated on the principle of immunity of both former and incumbent heads of state. It has indicated how there have been discrepancies at both national and international levels. With this in mind, the chapter advocates for harmonious interpretation and application of international law through a harmonious compliance with international law, norms and practices.

The international community has to get a common understanding on the necessity of prosecuting perpetrators of international crimes and this is much necessary in regard to Heads of state. There is a need by international community to make clarifications on the scope and effects of the principle of immunity to help national courts worldwide get a common approach on it.

It has further been demonstrated that the issue of equality among states has affected the way the principle of universal jurisdiction is approached in prosecuting alleged international crimes. The result has been, to some extent, selective prosecutions and/or shielding alleged perpetrators of international crimes from criminal prosecution in order to protect other interests. The AU opposition to the prosecution of Al-Bashir by the ICC show a lack of political will to respect international consensus on international criminal justice.

Much as there seems to be stability in legal developments in so far as sitting or incumbent head of state with respect to the most serious international crimes, there is however a degree of confusion about the law in as far as immunity of former head of state is concerned. The denial of immunity for Pinochet by the British Law Lords has reiterated that international crimes are outside the scope of official acts of states and that prosecuting former heads of states for international crimes committed at the time they were still in office may not infringe upon diplomatic relations.

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CHAPTER III – THE ICC PROSECUTION VIS-A-VIS THE PRINCIPLES OF UNIVERSAL JURISDICTION AND IMMUNITY FROM CRIMINAL PROSECUTION

3.1 Introduction

The International legal community is beset today with talk of accountability. States, international organizations, non-government organizations, and scholars speak of the need to hold individuals responsible for official acts that violate human rights. Some study the nature of various infractions with an eye toward codifications; others seek to create or engage mechanisms for trying or otherwise punishing individuals. Their common mission is based on a shared understanding that international law has a role to play not only in setting standards for states, non-state actors, and their agents, but in prescribing the consequences of a failure to meet those standards.¹⁵⁵

To understand the promises and limitations of individual accountability as a means to protect human dignity requires treating it as a discrete subject of international law. As such, it demands appraisal of a complex amalgam of law and a wide spectrum of sanctioning processes that transcend orthodox divisions of subjects within international law.¹⁵⁶ Its theory, doctrine, and practice spring from legal sources and events both ancient and modern; and ultimately an appreciation of the topic turns considerably on insights beyond international law, whether political or philosophical in origin.¹⁵⁷

It is against this background that the ICC was established. In this chapter, I discuss individual responsibility for international crimes and the prosecution thereof, the role of universal jurisdiction in such prosecution as interpreted by the ICC and, the key aspects of the principles of immunity and *jus cogens* nature of international crimes before the ICC.

3.2 Individual Criminal Responsibility for International Crimes

The law is no stranger to the idea of holding individuals responsible for egregious conduct toward their fellow human beings. Domestic criminal law, and civil law, evolved precisely to

¹⁵⁵ R Steven, *et al Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* 3rd Edition (2009) 1.

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

regulate this behaviour.¹⁵⁸ But the application of this law when those committing the conduct acted with the authority of the state has followed a far less certain path. For centuries, in tyrannical states, government officials could act with impunity; and while the rise of liberal government over the past 300 years has led to an overall improvement in the human rights records of some states, it has not, until very recently, opened the door to punishment of those officials who might continue to violate fundamental individual rights. Exceptions exist, of course, from older times, but the overall historical pattern was effective immunity from prosecution under domestic law for officials carrying out governmental acts.¹⁵⁹

In international criminal law the general principle applies that no one may be held accountable for an act he has not performed, or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him.¹⁶⁰ Whereas the criminalisation process in a national criminal system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties and conventions, or after a customary practice of unilateral enforcement of a prohibition by States.¹⁶¹

International human rights law confers rights and obligations upon states and human beings. Most human rights instruments in international law are designed to restrain the State rather than the individual human being from violating human rights.¹⁶² This should not be surprising since the State is usually the institution vested with principal legal authority and power to regulate life, liberty and property in society. Also, the state is the primary subject of international law. Accordingly, many human rights, especially civil and political rights, whether guaranteed nationally or internationally, are directed against the power of the State rather than other entities, not to interfere unduly with the rights and freedoms of individuals.¹⁶³

However, individuals could be held liable for crimes under international law and could be punished for them in a personal capacity. Considerations of the position of the individual in international law in legal doctrine and practice naturally revolves around the question as to

¹⁵⁸ *Idem*, at 3.

¹⁵⁹ *Ibid*

¹⁶⁰ See for instance article 22 of Rome Statute.

¹⁶¹ A Cassese *International criminal law* (2002) 136.

¹⁶² SL Sunga *et al Individual responsibility in international law for serious human rights violations* (1992)1.

¹⁶³ W Kaleck *et al international prosecution of human rights crimes* (2007) 56.

which entities may be subjects of international law.¹⁶⁴ The emergence of a general international legal norm providing individual responsibility for serious human rights violations would not be possible if international law were wholly inapplicable to the individual or if international responsibility as a legal category applied only to States and not to the individual. In estimating the likelihood of a general rule emerging, it is therefore necessary to understand the position of the individual in international law in terms of the incidence in which the individual has been or is, a subject of international rights and duties and the extent to which the individual may bring international claims.¹⁶⁵

3.2.1 The responsibility of Individuals as subjects of international law

The Nuremberg trials can be regarded as the starting point of modern recognition of individual responsibility in international law. Apart from the clear recognition of the principle of individual responsibility for international crimes, the Nuremberg trial was a breakthrough in that it did away with the immunity of government officials and ended the Act of State doctrine.¹⁶⁶ No one can escape criminal liability for international crimes, not even heads of state.¹⁶⁷

An understanding of the legal bases for individual responsibility for serious human rights abuses demands more than an elaboration of the elements of the various offences. For the involvement of individuals in atrocities encompasses countless possibilities- from perpetrator to accomplice, from commander to subordinate, from encourager to unwilling participant.¹⁶⁸

Like domestic law, international law provides for the imposition of liability on individuals for various types of conduct associated with the crime, even if the individual did not directly commit the crime. Notions of conspiracy and complicity received clear endorsement in Article 6(a) of the Nuremberg Charter which criminalized both preparing and conducting aggressive war and a common plan or conspiracy to do so. The Statutes of the *ad hoc* tribunals and the ICC, and especially the jurisprudence of the former, have most completely developed the various means by which a person may contribute to the commission of an

¹⁶⁴ *Idem* at 139.

¹⁶⁵ *Idem* at 141.

¹⁶⁶ The Act of State Doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation.

¹⁶⁷ EV Sliedregt *The criminal responsibility of individuals for violations on international humanitarian Law* (2003)3.

¹⁶⁸ Steven (note 155) 141.

international crime, or otherwise incur responsibility for it. They list different forms of responsibility for the commission of an offence such as physical commission, co-perpetration, indirect perpetration, and common-purpose liability known as joint criminal enterprise or JCE in the *ad hoc* tribunals.¹⁶⁹

Being deeply conscious of heinous crimes committed during the Second World War, the international community made a firm determination to establish some measures for international accountability. Hence in the aftermath of that war, the punishment of individuals for war crimes and crimes against humanity was attained at the Nuremberg and Tokyo Tribunals.¹⁷⁰

Also, after the World War II, efforts were made to create substantive laws and systems with binding international legal obligations upon states to protect the individual from gross and serious violations of human rights. Together with the prohibition of violations thereof, measures to pursue individual responsibility were discussed immediately after the establishment of the UN.¹⁷¹ An example of such efforts in the very early stages of the UN was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.¹⁷²

Since the 1990s, the international community has shown more and more intolerance for the impunity of those individuals who commit international crimes. It is considered that pursuing individual accountability contributes not only to comforting victims, but also to reconciliation and the prevention of future crimes. As a result of the interrelated development in international humanitarian, criminal and human rights law, the principle of individual responsibility for serious crimes has become one of the norms under international law.¹⁷³

Beyond the physical commission and collective participation in crimes, the statutes of international tribunals recognize aiding and abetting, which extends liability to persons at all

¹⁶⁹ Articles 7 of the ICTY Statute, 6 of the ICTR Statute, 25 and 28 of the ICC Statute contain several forms of responsibility.

¹⁷⁰ H Donnedieu de Vabres 'The Nuremberg Trial and the modern principles of international criminal law' in M. Guénael *Perspectives on the Nuremberg trial* (2008)215.

¹⁷¹ Inazumi (note 22) 20.

¹⁷² According to article IV of the Genocide Convention, act of genocide is condemned and any individual who commits such crime will be subject to punishment.

¹⁷³ Inazumi (note 22) 21.

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levels from the bottom to the high-ranking authorities who support the commission of a crime.¹⁷⁴ Some forms of responsibility for the commission of international crimes like complicity, conspiracy, joint criminal responsibility and incitement, trace their origins to familiar domestic law principles.¹⁷⁵

International criminal law, like domestic penal law, recognizes several ways in which joint perpetrators can be held criminally liable for their participation in the commission of crimes and this liability may be principal or accessorial. Thus, the defendant can be found liable if she/he committed, planned, or ordered a crime. Likewise, she/he may be found liable if she/he instigated, incited, aided and abetted, or was complicit in a crime. Many of these forms of liability inevitably involve two or more perpetrators: the direct perpetrators (who personally commit the crime and are directly liable) and the accessory (who is responsible for some substantial contribution to the crime).¹⁷⁶ Domestic criminal law recognizes various forms of complicity liability during the life of a crime, including accessory before and after the fact. To a certain extent, these forms exist in international criminal law as well.¹⁷⁷

The doctrine of superior (command) responsibility originated in international humanitarian law, although it is often invoked in domestic military justice proceedings and has domestic analogs in doctrines of *respondeat superior* (i.e. let the master answer).¹⁷⁸ As a form of accessorial liability, the doctrine of superior responsibility provides that a superior may be liable for the criminal acts of a subordinate if the superior knew of those acts and failed to fulfil a duty to prevent or punish them. The forms of accessorial liability ascribe liability based upon the defendant's relationship or association with others have become increasingly important in international criminal law, because the crimes in question often involve the participation of multiple individuals over vast distances of time and space. In addition, where a state or organization is involved at various stages of the crime, there may be some individuals designing and orchestrating an international crime and others actually carrying it out.¹⁷⁹

¹⁷⁴ Sliedregt (note 167).

¹⁷⁵ BV Schaack and CR Slye *International criminal law and its enforcement* (2007) 97.

¹⁷⁶ See Article 25 of the ICC Statute on individual criminal responsibility and Article 28 of the same Statute on responsibility of commanders and other superiors.

¹⁷⁷ *Idem* at 597-8.

¹⁷⁸ *Ibid*

¹⁷⁹ *Ibid*

Against this backdrop, the criminal responsibility of Al-Bashir may be established, if any, basing on both doctrinal and jurisprudential considerations on individual responsibility under international law. The ICC Prosecutor has already presented his evidence before the Court and arrest warrant has been issued against Al-Bashir. It would be up to Al-Bashir to prove his innocence if any.

3.3 Priority of prosecution of international crimes by national courts?

Exercising jurisdiction involves asserting a form of sovereignty.¹⁸⁰ A state jurisdiction refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in its territory in accordance with its municipal law.¹⁸¹ This fact causes difficulties when jurisdiction is exercised extraterritorially. Where extraterritorial jurisdiction is asserted sovereignties overlap, and general international law has not yet developed any principles to determine any hierarchy of lawful jurisdictional claims.¹⁸² Thus, two important and complementary means currently exist for the implementation of international criminal jurisdiction: prosecution by international criminal tribunals and the domestic application of the principle of universal jurisdiction.

International crimes are primarily intended to be prosecuted at the domestic level. To bring the alleged authors of international crimes to book, States need to have not only laws, statutes or some sort of judge-made legal regulation punishing those crimes, but also legal provisions authorising courts to prosecute and punish the alleged perpetrators.¹⁸³ National prosecutions of international crimes have been highly selective and, generally, States have been unwilling to prosecute their own nationals. This being the case, it results that Sudan may be unwilling or unable to prosecute its President regardless of what the result of the trial would be.

¹⁸⁰ In *Lotus Case (France v. Turkey)* PCIJ, Ser. A., No. 10, 1927., the ICJ held that it is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations.

¹⁸¹ R O'Keefe 'Universal jurisdiction: clarifying the basic concept' in *JICJ 2 (2004)*, 735-760 at 736.

¹⁸² Cryer (note 42) 54.

¹⁸³ A Cassese *International criminal law (2003)* 277.

3.3.1 The universal jurisdiction principle vis-à-vis international crimes

The twentieth century has not only seen atrocities on an unprecedented scale, but also the codification of the international community's promise to punish these crimes where domestic prosecutions fail.¹⁸⁴

With the October 1998 arrest of Pinochet by British authorities, an arcane principle of international law -universal jurisdiction- became the stuff of headline news and global debate.¹⁸⁵

Under international law, there are certain crimes, which are so destructive of the international order and are contrary to the interests of the international community as a whole, that they are treated as international crimes (*delicta jure gentium*).¹⁸⁶ It is generally accepted that since there exists a universal interest in repressing international crimes, States can exercise 'universal jurisdiction' over perpetrators of such crimes.¹⁸⁷ The term 'universal jurisdiction' has been used in confusingly different meanings and thus clarification of terminology may be helpful before going into further discussion.

The principle of universality permits any state to prosecute individuals against whom there is serious ground for suspecting that they have committed one of a handful of crimes that are subject to universal jurisdiction, regardless of where the offence took place and the nationality of the alleged perpetrator(s) and victim(s).¹⁸⁸ By its nature, universal jurisdiction represents a profound departure from core principles of sovereignty reflected in international legal principles governing the exercise of jurisdiction.

The first category of universal jurisdiction is also known as "universal jurisdiction proper" and the second as "universal jurisdiction in *absentia*". In the Arrest Warrant case, although the ICJ did not make any ruling on the legality of 'universal jurisdiction', the separate opinions of some of the judges clarify the terminology. For example, the panel president, M Guillaume, distinguishes between "universal jurisdiction", denoting jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum

¹⁸⁴ C Wilke 'A particular universality: Universal jurisdiction for crimes against humanity in domestic courts' (2005) 12 I *Constellations* 84 at 84.

¹⁸⁵ NL Sadat and PM Scharf *The theory and practice of international criminal law : Essays in honor of M Cherif Bassiouni* (2008) 127.

¹⁸⁶ Hamid (note 33).

¹⁸⁷ Wilke (note 169) 23.

¹⁸⁸ Cryer (note 42) 127-8.

State,¹⁸⁹ and “universal jurisdiction by default”, that is, jurisdiction asserted by a State without any link with the crime or the defendant, not even his presence on the territory.¹⁹⁰ As rightly put by Judge Oda, the law is not sufficiently developed in this area of universal jurisdiction.¹⁹¹

However, leading scholars and jurists had sought to establish a consensus regarding the basis of universal jurisdiction and the result was the ‘Princeton Principles on Universal Jurisdiction’, adopted in 2001.¹⁹² According to Princeton Principles, universal jurisdiction is a criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction. Such jurisdiction may be exercised by a judicial body of any State in order to try a person duly accused of committing serious crimes under international law provided the person is present before such a judicial body. The exercise of universal jurisdiction is generally reserved for serious international crimes, such as, piracy, slavery, war crimes, crimes against humanity, genocide, and torture.¹⁹³

This principle has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg, which had jurisdiction over crimes against humanity regardless where they had been committed.¹⁹⁴ Although the principle of universal jurisdiction in as far as prosecuting international crimes has been entrenched in international norms, which forms the basis of waiver of immunity of heads of state, its application has not wholly been accepted by the nations. This scenario explains why the two principles for and against immunity of heads of state against criminal prosecution contradict each other in different jurisdictions. The purpose of universal jurisdiction is to deny safe haven to persons

¹⁸⁹ It implies that according to him, an important characteristic of ‘universal jurisdiction proper’ is the presence of the accused in the forum state.

¹⁹⁰ Arrest Warrant case, Separate Opinion of President Guillaume paras 5- 9.

See also Keefe (note 181) 747.

¹⁹¹ Arrest Warrant case Dissenting Opinion of Judge Oda para 12.

¹⁹² The Princeton Principles on Universal Jurisdiction (2001). Available at <http://www.princeton.edu> [Accessed June 30, 2009]. The leading jurists included M. Cherif Bassiouni, Stephen Schwebel (former President of the ICJ), Lord Browne-Wilkinson (House of Lords of the UK), Michael Kirby (Justice of the High Court of Australia). Richard A. Falk (Professor of International law, Princeton), Anne-Marie Slaughter (President of the American Society of International Law).

¹⁹³ It is clear that the Princeton Principles recognize the universal jurisdiction proper (i.e. jurisdiction conditional upon the presence of the accused in the forum state) only and not recognize universal jurisdiction in *absentia*.

¹⁹⁴ See Article 6 of The Charter of the International Military Tribunal (1945).

suspected of having committed egregious crimes which are an affront to the international community as a whole.¹⁹⁵

In *Pinochet III*, the House of Lords held that, as required by the Torture Convention, 'all' torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. It can no longer be doubted that as a matter of general customary international law, a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.¹⁹⁶

Having said this, it emerges that there is even a way of compelling the suspects to voluntarily bring them to book if they do not wish to be judged *in absentia*. In the same vein, I do think that Courts should not wait until the suspect is arrested and brought physically to court because states for diverse reasons, including political reasons, can refuse to cooperate.

The notion of universal jurisdiction is often described to be in close relation with the notion of *jus cogens* and obligation *erga omnes*. It is presumed that any act violating a peremptory norm which is *jus cogens* will *ipso facto* be subject of universal jurisdiction, and, moreover, that the exercise of universal jurisdiction is *erga omnes*. *Jus cogens* is a rule which restricts the discretion and freedom of states to enter into a treaty by prohibiting them from making or adopting any instrument which violates a certain value. Therefore, even if two or more states sign an international agreement to commit gross and serious human rights violations, claiming the freedom of states to create a certain rule, the agreement would be null and void for violating *jus cogens*. Obligation *erga omnes* amounts to the obligations of a state towards the international community as a whole.¹⁹⁷

From this, it is evident that universal jurisdiction is not directly deduced from the notion of *jus cogens*, and vice versa at a strict theoretical level. The *jus cogens* rule only limits states' power to make an international agreement. Therefore in itself it does not order states to exercise their enforcement power. At the same time, the prohibition of a certain act becoming *erga omnes* does not automatically subject such act to universal jurisdiction. Nor does it

¹⁹⁵ J Pejic 'Accountability for international crimes: from conjecture to reality' (2002) 13. Available at <http://www.themissing.cicr.org> [Accessed 25 June 2009].

¹⁹⁶ Pinochet Case para 84.

¹⁹⁷ Werle (note 14), 124.

mean that states are obliged to exercise universal jurisdiction on such act. In this regard, Universal jurisdiction is most often provided coupled with the principle of *aut dedere aut judicare*¹⁹⁸ the objective of the later being to avoid crimes being left unpunished because there is no extradition or prosecution. Accordingly, if there is no extradition, the state will be obligated to refer the case its appropriate prosecuting authorities.¹⁹⁹

Thus, universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes. While there is no doubt that it is a useful and, at times, necessary technique, it also has negative aspects. The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity, and genocide; however, there may be other international crimes for which an applicable treaty provides for such a jurisdictional basis, as is the case with terrorism.²⁰⁰

Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.²⁰¹

Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes. It must also be harmonized with other jurisdictional theories. Furthermore, it should be noted that private international law has not yet developed rules or criteria of sufficient clarity to

¹⁹⁸ In law, the principle of *aut dedere aut judicare* (Latin for extradite or prosecute) refers to the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. This obligation arises regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator and victim may be of alien nationality. The rationale for this principle is to ensure that there are no jurisdictional gaps in the prosecution of internationally committed crimes. It is, however, unusual for states to be required to exercise this jurisdiction because often another state party will have an interest in the matter and will apply for extradition. In this situation that state will have priority.

¹⁹⁹ Werle (note 14) 121-2.

²⁰⁰ There is at present no universal treaty which comprehensively prohibits terrorism and applies in all circumstances. However, over the last few decades the UN has adopted a number of treaties dealing with specific aspects of terrorism among them: *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (1963), *Convention on the Suppression of Unlawful Seizure of Aircraft* (1970), *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (1971), *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (1973), *Convention against the Taking of Hostages*, (1979), *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988), *International Convention for the Suppression of Terrorist Bombings* (1997), *International Convention for the Suppression of the Financing of Terrorism* (1999).

²⁰¹ Werle (note 14) 125.

consider priorities in the exercise of criminal jurisdiction whenever more than one state claims jurisdiction.

3.4 When should international courts/tribunals intervene?

National courts have traditionally only sentenced people accused of crimes committed in their territory.²⁰² States can enact national laws which allow their national courts to investigate and, if there is sufficient admissible evidence; prosecute any person who enters their territory suspected of certain crimes, regardless of where the crime was committed or the nationality of the accused or the victim. This is the attribute of universal jurisdiction. There is also a possibility of prosecution by international criminal courts.

3.4.1 Universal jurisdiction and the international prosecutions of crimes

Pursuant to the official position of the accused or the character of the crime, there is a great possibility that a territorial state may not be capable of effectively prosecuting and punishing the crime. This will require another means than the national courts' jurisdiction to deal with it. Both universal jurisdiction and international criminal courts are intended to overcome the deficiency of the traditional jurisdictional system based on territorial jurisdiction in order to punish criminals and to end impunity. These two proposals share not only a common goal, but they are also presented as having similar underlying rationales. They are justified as being in the interest of the international community. The proponents of each proposal argue that because of the gravity of international crimes, universal jurisdiction should be admired as a means to ensure that those crimes would not go unpunished due to the unwillingness of states to exercise territorial jurisdiction.²⁰³

Some years before the IMT, the idea of international criminal accountability was not however neglected. The first genuine international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with crimes, convicted and beheaded.²⁰⁴ Thereafter, with the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian

²⁰² W Kaleck *et al International prosecution of human rights crimes* (2007) 45.

²⁰³ Cryer (note 47) 86.

²⁰⁴ MC Bassiouni 'From Versailles to Rwanda in 75 years: the need to establish a Permanent International Court' (1977) 10 *HHRJ* 25 at 35.

abuses slowly began to emerge. The emergence of the Nuremberg and Tokyo trials, the work of the international Law Commission, the creation of different *ad hoc* tribunals and the establishment of the ICC mark the international determination to prosecute and punish international crimes.²⁰⁵

The history of the development of universal jurisdiction has shown that although one of its rationales is the interest of international community, universal jurisdiction has been exercised by states, not by international institutions. Because universal jurisdiction is exercised by individual states, there is serious distrust among states of proceedings within other states. Although there are some overlaps, the idea of universal jurisdiction and of international criminal courts are substantiated at different points and situations and therefore have different rules and law applied to each. They also require different considerations in practice. For example, the ICJ treated the two differently in the ICJ decision on the Case Concerning the Arrest Warrant of 11 April 2000.²⁰⁶

The ICJ examined the rules of immunity taking into consideration the relevant provision from the charters of Nuremberg and Tokyo Tribunals, as well as from the statutes of the ICTY, ICTR, and ICC, which do not exempt responsibility on the basis of the suspect's official position, yet found that these provisions do not enable the court to conclude that any such an exception exists in customary international law in regard to national courts.²⁰⁷ President Guillaume also stated that the development of international courts as laid down by treaty or by the Security Council have no effect upon the jurisdiction of national courts.²⁰⁸ From this statement, it is very important to take note of these differences in order for each of them to function properly and effectively. And thus far, Sudan has been ignoring the arrest warrants of the ICC and expressed its wish not to prosecute Mr Bashir by Sudanese courts which amounts to convincing grounds of resorting to universal jurisdiction.

²⁰⁵ AW Schabas *An Introduction to the International Criminal Court* 3rd Edition (2007) 5-21.

²⁰⁶ Inazumi (note 22) 120.

²⁰⁷ The ICJ Judgement of 14 February 2002 in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) para. 58. The Court is also observed to be treating the international criminal courts differently from national courts when it noted that the immunities enjoyed by an incumbent or former Minister for Foreign Affairs do not preclude criminal proceedings before 'certain international criminal courts', such as the ICTY, ICTR, and the ICC *Ibid* para. 61

²⁰⁸ Separate Opinion of President Guillaume, Case Concerning the Arrest Warrant of 11 April 2000 *parall*. See also Keefe (*supra* note 166)749.

3.4.2 The International Criminal Court proceedings and enforcement of sentences

Despite the advent of the Nuremberg and Tokyo trials, fifty years later, most perpetrators of human rights and humanitarian law violations were still not held accountable for their deeds. The international community gathered in Rome to create a new instrument in the fight against the most heinous crimes of international concern.²⁰⁹

The establishment of the ICC to try individuals who commit the most serious crimes under international law constitutes a momentous step forward. The Rome Statute creating the ICC has laid the foundation for an international mechanism to bring the architects and perpetrators of grave international crimes to justice. The ICC does not have the benefit of its own police force but will rely on the cooperation of states to assist in its investigations and to carry out its judicial orders. Under the Rome Statute and for the very first time in the first time in the framework of international criminal proceedings, victims of crimes and their families or their legal representative, can access the Court to express their view and concerns, and they may claim reparation for the wrong suffered.²¹⁰

One of the preconditions for states to agree to the Rome Statute was the development and adoption of the principle of complementarity. This principle not only introduces a new approach to international criminal law, it also represents the corner stone of the ICC.²¹¹

In the solemn undertaking he made upon assuming office, The ICC Prosecutor Luis Moreno Ocampo said that as consequence of complementarity, the number of cases before the Court should not be used as a measure of its efficiency. On the contrary, he insisted that the absence of trials before the Court as consequence of the regular functioning of national institutions would be a major success.²¹² The Prosecutor's remarks were very much in the spirit of the Rome Statute preamble which recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, and which emphasizes that the ICC established under this Statute shall be complementary to national criminal jurisdictions.²¹³

²⁰⁹F Razesberger *The International Criminal Court* (2006) 17.

²¹⁰ NK Calvo-Goller *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (2006) 1.

²¹¹ Razesberg (note 209) 18.

²¹² M Politi and F Gioia *The International Criminal Court and National Jurisdictions* (2008) 25.

²¹³ Para10 of the Preamble of the Rome Statute.

3.4.2.1 The principle of complementarity in international criminal law

Complementarity is a new concept in international criminal law.²¹⁴ The ICC is applying the provisions regulating this new principle for the first time and most of the issues that scholars tried to anticipate have not come before the Court yet. However, the complexity of the respective provisions in combination with different interests of the parties to the proceedings necessitates a dynamic and flexible approach to ensure the success of the ICC. This will greatly depend on the application of the principle of complementarity.²¹⁵

As a general rule, the policy of the Office of the ICC Prosecutor is to undertake investigations only where there is a clear case of failure to act by the state or states concerned. The principle of complementarity represents the express will of states parties to the Rome Statute to create an institution that is global in scope while recognising the primary responsibility of states themselves to exercise criminal jurisdictions. It is based on considerations of efficiency and effectiveness since states will generally have the best access to evidence and witness.²¹⁶ The ICC Prosecutor should also assess whether the state has provided easy access to police and judicial authorities for filing complaints.

The crucial provision providing the judicial yardstick for the application of complementarity is article 17 of the Rome Statute of ICC which talks of issues on admissibility.²¹⁷ Further important provisions in relation with complementarity are article 18 on 'Preliminary rulings regarding admissibility', article 15 on the 'Prosecutor', article 20 on the principle of *non bis in idem*²¹⁸ and article 53 on an 'Initiation of an investigation'. These provisions are the key facet for complementarity within the Rome Statute as they show when and how the Office of the ICC Prosecutor can manage to investigate and prosecute a certain situation.

²¹⁴ This notion came up with the creation of different international tribunals.

²¹⁵ Politi (note 212) 21.

²¹⁶ Paper on some policy issues before the Office of the Prosecutor', September 2003. Available at <http://www.icc-cip.int>. [Accessed on 30th August 2009].

²¹⁷ Article 17(1) of Rome Statute provides among others that the Court shall determine that a case is inadmissible where the case is investigated and prosecuted by States which have jurisdiction over it and where the case has been investigated by State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

²¹⁸ *Ne bis in idem*, which translates literally from Latin 'not twice for the same', means that no legal action can be instituted twice for the same cause of action (double jeopardy).

Complementarity is often regarded as a product of compromise.²¹⁹ However, I argue that this is not a compromise but rather as a political as well as judicial necessity without alternative, as long as the ICC is to be considered an independent judicial authority with three trigger mechanisms. The Prosecutor under the control of the Pre-trial Chamber will decide which situation is to be proceeded with, and which not.²²⁰ The Court's jurisdiction is triggered either by a referral to a situation by the Security Council or a State party or by the Prosecutor starting proceedings *proprio motu*.²²¹ An International Criminal Court that enables its Prosecutor to start proceedings *proprio motu* or by a referral of a situation by a State party needs a complementarity threshold as long as it does not intend to turn from a judicial into a totally political body.

Moreover, the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States. The concept of complementarity seems to imply an antagonistic relationship between national justice and International Criminal Court. Initiatives by the Prosecutor would be a sign that the national system had failed to perform it.²²²

Darfur is the one situation to come before the Court where complementarity is likely to be challenged by the State itself. When the Independent Commission of Inquiry²²³ proposed that the UNSC refers the Darfur situation to the ICC, it based its arguments on the issue of complementarity. According to the Commission, the normal and ideal response to atrocities is to bring the alleged perpetrators to justice in the courts of the states where the crimes were perpetrated, or of the State of nationality of the alleged perpetrators.²²⁴

There may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the

²¹⁹ Razesberger (note 209) 26.

²²⁰ Article 53 of Rome Statute provides the way in which investigations are initiated. Likewise, article 58 to arrest warrants and summons to appear.

²²¹ Politi (note 212).

See also the Case *ICC-CPI-200090925-PR455 (The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui)* where the Court has decided about the complementarity.

²²² Razesberger (note 209) 25.

²²³ The International Commission of Inquiry on Darfur was established pursuant to UNSC resolution 1564 (2004). The resolution passed under Chapter VII of the UN Charter requested the Secretary-General rapidly to set up the Commission. In October 2004, the Secretary-General appointed five member body (Antonio Cassese from Italy (chairman), Mohammed Fayek from Egypt, Hina Jilani from Pakistan, Dumisa Ntsebeza from South Africa and Theresa Striggner-Scott from Ghana).

²²⁴ Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur UN DocS/2005/60 para.568

very nature of most international crimes implies, as a general rule, that they are committed by States officials or with their complicity; often their prosecution is therefore better left to other mechanisms. Considering the nature of the crimes committed in Darfur and shortcomings of the Sudanese criminal justice system, which has led to impunity for the alleged perpetrators, the Commission is of the opinion that Sudanese courts are unable and unwilling to prosecute the alleged offenders and that other mechanisms are needed.²²⁵

Due to practical and financial realities, it is impossible for the ICC to prosecute every admissible situation. Hence the ICC, namely the Prosecutor will have to choose which situation has to be proceeded with and which not²²⁶, the follow up on which situations could be expected to be a succeed, and which situations are not out of the capability of the ICC to cope with. These political and financial realities lead to pure political decisions. For that reason it is up the ICC to decide if a situation is followed up or not. However the question is to what extent political considerations can be strained in order not to undermine judicial impartiality.²²⁷

This political element has been criticised strongly as it appears to turn the Prosecutor into a policy-maker competing with the UNSC. It would propose a different view as the UNSC remains superior to the Prosecutor via article 16 of Rome Statute which empowers the UNSC to defer any investigation launched by the Prosecutor.

3.4.2.2 Key aspects and fundamental necessities for the ICC and international criminal cooperation

An assessment of the cooperation regime under the Rome Statute reveals that it is characterized by a decisive structural weakness since the ICC does not have the competencies and means to enforce its own decisions. Under the Statute, the ICC has no executive powers, no police force of its own or other executive units. It is totally dependent on full, effective, timely and predictable cooperation, in particular from States Parties. This is true especially with regard to the decisive question of the effective execution of arrest warrants and surrender of suspects to The Hague.²²⁸

²²⁵ *Ibid*

²²⁶ Article 53 Rome Statute.

²²⁷ Razesberger (note 209) 25.

²²⁸ H-P Kaul 'The ICC and criminal cooperation' in M politi and F Gioia (*Supra* note 171)85.

The creators of the ICC in a bid to enlist the cooperation of states parties and to diffuse tension that had threatened the conference at which the statute of the ICC was agreed to, ensured states parties returned their sovereignty. Against this background, part 9 of the Rome Statute on international cooperation and judicial assistance seeks to ensure the functioning of the ICC through some main elements. According to article 86, States parties have a general obligation to cooperate fully with the ICC with respect to its investigations and prosecutions. Article 88 provides that States parties shall ensure that procedures are available under national law for all forms of cooperation specified in that part whereas article 97 states that States Parties shall consult with the ICC without delay in order to resolve any problems which may impede or prevent the execution of requests.

The measures stipulated in part 9 represent the minimum and guaranteed obligations accepted by States Parties to the Rome Statute. States not parties have no obligations to cooperate except when the Security Council refers a situation to the Court pursuant to article 13b and obliges non-Members States under Chapter VII of the UN Charter to cooperate with the Court. However there are no means of enforcement of such obligation. Concerning Darfur, Sudan may be expected to challenge prosecutions by arguing that it is in fact willing and able to prosecute. When the ICC Prosecutor made his bi-annual report to the UNSC, in June, Sudan took the floor.²²⁹

According to the report, Sudanese authorities said that its internal judicial system was prosecuting the perpetrators of the crimes in Darfur. The Prosecutor learned that a special prosecutor was appointed to look into cases in Darfur and that some had been decided. Special courts had been established and have handed down many criminal sentences, including execution and life imprisonment. The Sudanese authorities had suggested that their Government would continue to establish the rule of law and justice through the courts and other mechanisms, to put an end to impunity and to hold accountable all those convicted of violations of human rights and international humanitarian law.²³⁰ It may well be that, spurred by the UNSC referral; Sudan is trying to address impunity.

In this situation, the ICC requested cooperation for the arrest and surrender of Al-Bashir to Sudan, and to all states parties to the Rome Statute and all the UNSC members that are not

²²⁹ Ninth Report of the ICC Prosecutor to the UNSC (2009).

²³⁰ UN Doc. S/PV.5450 pp 5-6. Available at www.icc-cpi.int. [Accessed 30th August 2009].

party to the Statute. The Judges found that, according to UNSC resolution 1593 and article 25 and 103 of the UN Charter, the obligation of the Government of Sudan to fully cooperate with the Court prevails over any other international obligation that the Government of Sudan may have undertaken pursuant to any other international agreement.²³¹

The ICC also found that the Government of Sudan has systematically refused to cooperate with the Court since the issuance of warrants for the arrest of Ahmad Harun and Ali Kushayb. Since 2005, the Office of the Prosecutor had endeavoured to establish a working relationship with the GoS, and the Sudan had provided a degree of cooperation up to February 2007. Judicial records were shared. Individuals were interviewed in Khartoum under article 55 of the Statute. Documents were provided to the Office under article 53 of the Statute. Such cooperation by the GoS no longer exists.²³²

The Prosecution reports state that the GoS has refused to cooperate with the Court and the Prosecutor, in contradiction with UNSCR 1593 while other parties to the conflict have offered a degree of voluntary cooperation.²³³ Grave threats were directed to those perceived to be cooperating with the Court.²³⁴ As a result, the Judges emphasized that, according to article 87(7) of the Statute, if the Government of Sudan continues to fail to comply with its cooperation obligations to the Court, the competent Chamber may make a finding to that effect and decide to refer the matter to the Security Council for any necessary measure. Furthermore, the Judges noted that the dispositive part of UNSC Resolution 1593 expressly urges all States, whether party or not like Sudan to the Rome Statute, as well as international and regional organisations to cooperate fully with the Court.²³⁵

This regime as laid down in part 9 of the Rome Statute must be seen as a reality which cannot be altered easily. This regime therefore must be accepted by all concerned, namely the Court itself and in particular the Office of the Prosecutor, the States Parties, international

²³¹ Article 25 of the UN Charter obliges state members to accept and carry out the decisions of the Security Council while article 103 provides the supremacy of the UN Charter over any other international agreement.

²³² *Supra* (note 6) para 48-49.

²³³ *Idem* para 20-23. According the report in para 38, the five rebel groups, parties to the conflict, Sudan Liberation Army (SLA)/Abdel Wahid, SLA Abdul Shafie, SLA/Unity, United Resistance Front (URF) and Justice and Equality Movement (JEM), publicly affirmed since 20 November 2008 their intention to cooperate with the ICC even if individuals in their ranks were sought by the Court for the Haskanita attack or other alleged crimes.

²³⁴ *Idem* para 38.

²³⁵ UNSC Resolution 1593 (2003) para 2.

organisations and NGOs. All these actors are called upon to breathe life into the cooperation system under the Statute and to exhaust its possibilities for effective, speedy, unreserved and sustained cooperation. This is in itself an ongoing task and challenge, with many related necessities.

Where the Prosecutor receives a referral from a state in which a crime has been committed, the Prosecutor knows that that state has the political will to support his Office as required under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigations, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.

This is not the case in the Darfur situation. While the Sudanese authorities pretend to prosecute the crimes' perpetrators in Darfur, the leaders wanted by the ICC, namely Al-Bashir, Harun and Ali Kushayb, are not among those being nationally prosecuted either because of the principle of immunity of heads of state or political interests.

All in all, the system of cooperation under the Rome Statute may be regarded as a compromise and as a hybrid system. It contains a mix of elements of vertical and horizontal criminal cooperation of both the supra-national and interstate model of the Court, there remains in practice a lot of discretion, for example, if a request for cooperation is in conflict with a national existing fundamental legal principle of general application, or where the documents or evidence concerned relate to national security.²³⁶ States are thus not under any strict obligation to give priority to the Court's requests for surrender or assistance. Instead, the Statute foresees consultations in cases of problems arising in the context of a cooperation request from the Court.²³⁷

3.4.2.3 Towards the trial of Bashir: Issues and challenges

The creation of international tribunals to try perpetrators of heinous crimes and the drive to establish a Permanent International Criminal Court represent a turn from blanket amnesties and *de facto* impunity toward policies of holding leaders and public officials accountable for

²³⁶ Politi (note 212)87.

²³⁷ *Ibid*

their actions. This shift toward holding leaders and public officials accountable raises its own questions.²³⁸

President Bashir is the first sitting head of state indicted by the ICC, which sends a signal that no one is above the law. The ICC will only be as powerful as states want it to be.²³⁹ The ICTY waited 12 years from the time it issued a warrant for the president of the self-proclaimed Republika Srpska, Radovan Karadžić, until his arrest in 2008.²⁴⁰

This was not unprecedented since Al-Bashir is poised to become the third sitting head of state to be indicted by an international court after Milošević and Taylor. Nonetheless, this is a controversial move, as Bashir has allowed the United Nations to send a joint UN-AU peacekeeping force to stabilise Darfur amid several peace initiatives that some commentators believe the ICC charges could jeopardise.²⁴¹ The recent ICC charges have fuelled a heated debate (and growing scepticism among African observers) about the ICC's involvement in Africa.²⁴²

Sudanese law may provide the head of state with immunity in Sudan and therefore refuse to execute the Court decision but article 27 of the Rome Statute says that immunities do not bar the Court from exercising its jurisdiction. Moreover, Sudan has not ratified the Rome Statute of the ICC and does not officially recognise the Court's jurisdiction. Again, some proceedings in Sudan intend to bar the ICC intervention due to the complementarity principle.

In normal circumstances, the ICC cannot exercise its jurisdiction over non-state parties like Sudan that have not ratified its Statute. It is true that article 4 of Rome Statute gives the Court an international legal personality with the authority to exercise its functions and powers on

²³⁸ JE Mendez *National reconciliation, transitional justice, and the International Criminal Court*. Available at <http://www.questia.com> [Accessed 30th July 2009].

²³⁹ P Gaeta 'Does President Bashir enjoy immunity from arrest?' (2009) 72 *JICJ* 315a t 323.

²⁴⁰ R Ruby and S Boykewich *Q&A: ICC Arrest Warrant for the Sudanese President Omar al-Bashir*. Available at <http://www.slcmp.or/drwebsite/commentaries> [Accessed 28 June 2009].

²⁴¹ Mendez (note 220).

²⁴² The problem of why the ICC is only focusing to African leaders until now does not have a clear answer. Many wonder about why the ICC does nothing about what happen in Iraq, Afghanistan, Pakistan, China and elsewhere than in Africa.

the territory of any State Party or, by special agreement, on the territory of any other state.²⁴³ But articles 34-37 of the Vienna Convention on the Law of Treaties exempt third parties (non-signatory parties) from any obligations or rights arising from treaties that they have not ratified, unless they expressly accept this obligation in writing. Article 35 of that Convention states this explicitly, even if the parties to the treaty intended some of its provisions to apply to third parties.²⁴⁴

However, given Sudan's membership of the UN, the ICC can indirectly exercise its jurisdiction over Sudan if the UNSC refers Sudan to it, which has been done. Thus, the Prosecutor has acted lawfully and in accordance with his powers within the Rome Statute when he initiated investigations into alleged crimes in Sudan after the UNSC referred the situation of Sudan to the Court, but Sudan argues that it is not party to the ICC and that its national system is prosecuting perpetrators of the crimes.²⁴⁵

This makes it important to establish whether there is a binding link, even indirect, between Sudan and this provision of the Rome Statute. For that purpose, it is worth noting that Article 2 of the Rome Statute stipulates that 'the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties' and the Negotiated Relationship Agreement between the International Criminal Court and the United Nations relationship is now in force since 04.10.2004 even if it does not really bind Sudan.²⁴⁶ However the effect of the referral of the UNSC is that Sudan is to be regarded as bound by the ICC Statute.²⁴⁷

Even if under *jus cogens* and international customary law, Heads of State enjoy immunity from criminal prosecution, the *jus cogens* nature of international crimes cannot allow the applicability of the principle of heads of state immunity where they are charged of having

²⁴³ IK Souaré *Sudan : What implications for President Al-Bashir's indictment by the ICC?* Available at <http://www.iss.co.za> [Accessed 15th July 2009].

²⁴⁴ According to that article 'an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.

²⁴⁵ D Akande 'The legal nature of Security Council Referrals to the ICC and its impact on Al Bashir's immunities' (2009) 72 *JICJ* 333 at 335.

²⁴⁶ See UN General Assembly, Resolution A/RES/58/79 of 9 December 2003.

²⁴⁷ Akande (note 245) 333.

committed those crimes. This is what is provided for in article 27 of the Rome Statute.²⁴⁸ Given that the Statute operates in the Sudanese case not as a treaty but on the contrary by virtue of being a UNSC Resolution, the removal of immunity operates even with regard to non-parties in accordance with Article 25 of the Charter of UN²⁴⁹ and article 103 providing for the supremacy of the UN Charter. In case of UNSC referral, all states (including non-parties) are bound to accept that the Court can act in accordance with its Statute. Therefore, the international law immunities of Sudanese officials (including the immunity of head of state) are then removed as a result of the ICC Statute and the UNSC referral.²⁵⁰

However this writer thinks that being that even the UN Charter is in itself a treaty and a treaty normally doesn't derogate from *jus cogens* norms, the *jus cogens* nature of international crimes should be the leading basis for prosecuting Al-Bashir.

With its focus on individual accountability for the commission of serious crimes under international law, the ICC suggests that globalization is no longer just about trade and international commerce, but concerns human rights as well.²⁵¹ The mission of the Rome Statute to end impunity is a task that may ultimately prove too great for an institution like the ICC. Yet the transformative potential of the institution lies not only in its own power but in its ability to act as a catalyst for change at the state and local level.²⁵²

The choice of a proper concept of criminal responsibility sustaining the charge against high-level perpetrators like Al-Bashir is not obvious.²⁵³ Even if prosecutions have only been possible where the regime has been militarily defeated or there has been a substantial change in the target regime's composition or agenda, indictments can at least hamper the political

²⁴⁸ Article 27 makes the situation clear when it states that the 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 the 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 capacities of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

See also P Gaeta (note 221) 332.

²⁴⁹ Article 25 of the UN Charter provides that The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

²⁵⁰ Akande (note 245) 342.

²⁵¹ Sadat (note 170) 313-4.

²⁵² *Idem* 314.

²⁵³ HG Van der Wilt 'The continuous quest for proper modes of criminal responsibility' (2009) 72 *JICJ* 307 at 307.

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²⁵¹ Sadat (note 170) 313-4.

²⁵² *Idem* 314.

²⁵³ HG Van der Wilt 'The continuous quest for proper modes of criminal responsibility' (2009) 72 *JICJ* 307 at 307.

career of the accused, and weaken their hold on power in the long run. Charles' Taylor arrest is a reminder that, as demands for accountability proliferate, perpetrators international crimes will have to be careful about their travel destination, and concerned about their eventual overthrow or retirement.²⁵⁴

In the Sudanese case, the lack of immunity as stated above means that under Article 98, a state party to the ICC Statute would not be acting contrarily to its obligations under international law in arresting and surrendering Al-Bashir to the Court. As regard to non-parties, they are not obliged to do so unless they find it mere as the UNSC council has only imposed obligation of cooperation to one non-party, Sudan. There is only one set of immunities that may not be removed by the UNSC in Al-Bashir case: the immunities of representatives to the UN conferred by the UN General Convention on Privileges and Immunity and Article 105(2) of the UN Charter which are binding to the UNSC. If never Al-Bashir were travelling in accordance with the UN meeting where he represents his state, he would be immune from arrest.²⁵⁵ However, in such case, he would need a visa and the question would arise as to whether he could be denied access to the United States as there is an agreement between the USA and UN to permit entry of representatives to the UN Headquarters' district.²⁵⁶

3.5 Concluding Remarks

This chapter has concentrated on the principles of universal jurisdiction and immunity from criminal prosecution before the ICC. It did not intend to treat those concepts in their deep application in national and international law but rather how they are applied within international law compared to the ICC functioning and goals. We have mentioned, just to put it in less detail, how the principle of universal jurisdiction can be applied at national level.

If the world community feels that the perpetrators of international crimes are to be punished regardless of their official positions, their nationalities and the place where crimes have been

²⁵⁴ P Castillo 'Rethinking deterrence: The International Criminal Court in Sudan' 2007 14 *UNISCI discussion papers* 179 at 179.

²⁵⁵ Article 105 of the UN Charter provides that 'Representatives of the Members of the United Nations and officials of Organizations shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.'

²⁵⁶ Akande (note 245) 352.

committed, certain principles must guide the prosecution. It is important to approach the concepts of individual criminal responsibility, to see how international crimes are prosecuted in domestic law and on international level, and especially how the ICC prosecutes international crimes and the enforcement of its decisions. Therefore, the international community should be aware on whether and where heads of state must be prosecuted.

This chapter has also tried to show that the erosion of equality among nations in determining international issues has led to the instability of some international rules, including, *inter alia* the application of the principle of universal jurisdiction in prosecuting alleged international crimes. The indictment of the Sudanese authorities is seen as a controversial issue in different parts of the World. Whereas some argue that it is justified, others see it like the violation of Sudanese sovereignty.

This chapter has further discussed that the ICC relies on states cooperation to enforce its decisions when it comes to their execution. Generally the Registrar of the ICC is responsible for transmission of the documents requesting for cooperation as well as for receiving all responses to the request. In particular, states parties agree to use their national authorities to arrest suspects and transfer them to the Court. Additionally, when the UNSC refers cases to the ICC, all UN members are required to cooperate with the ICC in specific situations.

Beyond any obligations arising out of the Rome Statute or Security Council, state cooperation is reinforced by the political will to address atrocities and egregious violations of international humanitarian law.

In my opinion, the international community could take steps to exert pressure on the government of Sudan to comply with the Court's request. The ICC could report Sudan's failure to cooperate to the Security Council, which could then potentially take measures such as sanctions against Sudan. Additionally, individual states could introduce sanctions targeted at the Sudanese government to encourage compliance. Neighbouring countries could also exert diplomatic pressure on Sudan in order to persuade the government to cooperate with the Court. As an alternative to state cooperation, the African Union and United Nations peacekeeping forces in Sudan could potentially be authorized to execute the arrest warrants if the Sudanese government fails to do so.

This has been the case in the former Yugoslavia. Whilst it does not have the authority to arrest persons accused by the Tribunal, the North Atlantic Treaty Organization (NATO) Implementation Force (IFOR) and Stabilisation Force (SFOR) nor states participating in the multinational force appeared to be obliged to execute arrest warrants.²⁵⁷ Such a duty can only be imposed by a Security Council resolution: alternatively, it can derive from a conventional undertaking between NATO and the competent authorities of Bosnia and Herzegovina. It is submitted that the legal view advanced is based on a proper interpretation of the relevant international instruments. These instruments reflect the position of the major powers involved in the efforts to restore peace in the former Yugoslavia. The states which brokered the Dayton Peace Agreement²⁵⁸ and played a major role in its negotiation and drafting intended to grant NATO forces very extensive powers. However, they did not immediately confer on them a wide range of specific powers, including the power to arrest indictees. On 16 December 1995 the North Atlantic Council provided for the attribution to the multinational force of the power of arrest of persons indicted by the Tribunal.²⁵⁹

This decision of the North Atlantic Council may of course be strengthened, should the Council deem it advisable to extend SFOR powers concerning cooperation with the Tribunal to other matters, or even to grant SFOR troops the power to seek out indictees for the purpose of arresting them. This ICTY experience would serve as example to the ICC in working with the UN/AU forces in Sudan.

The issuance of the arrest warrant against Al-Bashir is undoubtedly a landmark event which can leave one hope that in the future, the ICC will be able to assert itself as a credible institution able and willing also to prosecute crimes committed by nationals of the most powerful countries for the purpose of dispensing justice for all.

²⁵⁷ P Gaeta 'Is NATO authorized or obliged to arrest persons indicted by the International Criminal Tribunal for the Former Yugoslavia' (1998) 9 *EJIL* 174 at 181.

²⁵⁸ The Dayton Agreement was a General Framework Agreement for Peace in Bosnia and Herzegovina signed in Paris on December 14, 1995.

²⁵⁹ Gaeta (note 257) 190.

CHAPTER IV – GENERAL CONCLUSION AND RECOMMENDATIONS

4.1 Conclusions

In a nutshell, this work has made a contribution to the general doctrine of immunity of states vis-à-vis the principle of universal jurisdiction. It has argued that the principle of state sovereignty is being re-configured in international law. The question of immunity is now challenged in international law, especially when it comes to International Criminal Law.

In this vein, I have noted that national courts administer systems of criminal law designed to provide justice for victims and due process for accused persons, that nation's courts exercise jurisdiction over crimes committed in its territory and proceed against those crimes committed abroad by its nationals, or against its nationals, or against its national interests. When these and other connections are absent, national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity that they affect the fundamental interests of the international community as whole. Universal jurisdiction is premised on the notion that there exists a certain class of criminal offenses deemed to be so serious, so unacceptable by a civilized world, that any court anywhere is permitted by international law to both prosecute and punish, irrespective of the crime's place of commission or the nationality of the offender or the victims.

In principle, neither immunity under national law nor immunity under international law prevents prosecution for crimes under international law. The only exception is prosecution of heads of state and government, foreign ministers, and diplomats while they are in office, and only for prosecution by states. However prosecution by international courts is always possible (for instance in the case of the ICC). This is true even when the perpetrator derives his/her immunity from a non-state party. In the case of *The Prosecutor v. Radovan Karadžić*²⁶⁰ the ICTY Chamber of Appeals confirmed it when it stated:

One of the fundamental aims of international criminal courts and tribunals is to end impunity and ensure that serious violations of international humanitarian law are

²⁶⁰ Case No IT-95-5/18-AR73.4 *The Prosecutor v. Radovan Karadžić* (12 October 2009) ICTY, para 52.

prosecuted and punished. Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution.

It results that individual criminal responsibility can be established under international law. Nevertheless, I have argued that establishing individual criminal responsibility against persons enjoying immunities be it diplomatic immunity or state immunity is not as easy as one would expect it under the well-established principles of international law. Many factors are likely to intervene and impair this process. Such factors include but are not limited to political reasons and the use of state sovereignty as a smokescreen to hide human rights violators at national level. The case of the arrest warrant on Al-Bashir that has been referred to through this work is very illustrative of this reality. This case as well is an example whereby the UN still has to face with the issue of legitimacy among its members. In fact, the case was referred to the ICC prosecution by a Resolution of the UN General assembly. Yet member states of the UN have been reluctant to help the ICC go on with its arrest warrant. The position of AU members, except a very few of them, is an example of political lobby against ICC warrants.

4.2 Recommendations

In line with all the above, this writer recommends the following:

Enhancing the proper exercise of universal jurisdiction by national courts in order to help close the gap in law enforcement that has favoured perpetrators of serious crimes under international law;

Fashioning clearer and sounder principles to guide the exercise of universal jurisdiction by national courts to help punish, and thereby to deter and prevent, the commission of these heinous crimes by establishing principles to guide, as well as to give greater coherence and legitimacy to, the exercise of universal jurisdiction. These principles should promote greater accountability for perpetrators of serious crimes under international law, in ways consistent with a prudent concern for the abuse of power and reasonable solicitude for the question of peace and security;

prosecuted and punished. Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution.

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Respecting the 'Obligation to support accountability' whereby a state shall comply with all international obligations applicable to the prosecution or extradition of the accused; without hiding themselves behind political reasons;

That 'Immunities' should not relieve such person of criminal responsibility nor mitigating punishment or be used as smokescreens to build up a culture of impunity.

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