

**CRIMINAL RESPONSIBILITY OF HEADS OF STATE FOR HUMAN
RIGHTS VIOLATIONS: WILL THE KING EVER SUBMIT HIMSELF TO
THE LAW?**

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**Submitted to
Central European University
Department of Legal Studies**

**In partial fulfilment of the requirements for the degree of Master of Law in Human
Rights**

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Budapest, Hungary

2009

ACKNOWLEDGEMENTS

I would like to express my gratitude to Professor Ana Vrdoljak for supervising and guiding me in this thesis. I also particularly thank her for encouraging me to explore, to a further depth, a realm of public international law that I would not have appreciated as much if I had not done this work.

Many more thanks go to my family, especially to my siblings back in Uganda, who I hope will be inspired by my life journey.

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EXECUTIVE SUMMARY

This thesis reassesses the doctrine of head-of-state immunities and, of official immunities in general, with the view of examining whether the prosecution of international crimes and other gross human rights violations should be subject to these rules. The main premise of the thesis is that establishing the criminal responsibility of heads of state and of other high-ranking state officials otherwise immune from prosecution is the final battleground in the fight against impunity. If this struggle is lost, the massive human rights normative frameworks—and particularly those that expressly purport to derogate immunities—will also risk the loss of public confidence. The research, which has comprised a broad review and analysis of legal literature, jurisprudence and scholarship on the subject, notes *inter alia*, the following:-

First, is that the theories that for centuries have anchored the notion of official immunities have increasingly become less supportive of blanket immunities. In sharp contrast, however, the insistence of state leaders on retaining immunity has only grown stronger, and the reason currently advanced by the International Law Commission's 2008 report on Immunities of State Officials from Foreign Criminal Jurisdiction is *the sake of stable relations among States*. A narrative hardly questioned, yet presented without any sound scholarly basis or proof.

Second, much has been written on the doctrinal history of and rationales for official immunities. But very little of the scholarly works reviewed subject the underlying theoretical assumptions of immunity to the rigor of modern legal investigation. For example, as noted above, there is no research linking 'stability of interstate relations' to official immunities. Yet rhetorically the claim is accepted as a nearly mystical truth and the basis considered as *trite law* reflective of established international customary law.

Third, some major judicial decisions handed down within the last decade with regard to suits against *serving senior state officials*, most notably, *the Case Concerning the Arrest Warrant of April 11 2000* (DRC v. Belgium), the *Qaddafi case*, and *Al-Adsani v. United Kingdom*, and in fact the *Pinochet case* argue that, under customary law, international immunity *ratione personae* extends even to cases of crimes of peremptory norms of *jus cogens* status. The argument is that this extension should occur regardless of the existing binding prosecutorial *obligation* imposed on states by various international treaties to prosecute such crimes. In a similar tone, are perhaps rooted in the above decisions, is an emerging scholarly view that interprets the current state of the law on immunity as preventing states from executing the arrest warrants of international courts/tribunals issued for heads of state and high-ranking officials of other states. This view is buttressed by the claim that immunity for state officials is only procedural and does not alter an individual's criminal culpability. Yet, the claim draws no attention to the impact of delayed prosecution (due to the need to respect *immunity*) on the due process rights of victim's, their right to access to court and overall the fight against *impunity*.

Lastly, states have in other spheres, for example, in the sphere of commercial transactions, accepted restrictions on official immunities and have not advanced the argument that the restrictions have resulted in a tit for tat pattern of retributive action to threaten interstate relations. It is quite ironical why the idea of retributive action continues to inform the arguments in the human rights arena. Yet without the removal of *immunity* obstacles, hardly can the goal of suppressing state sponsored terror and violations of human rights be met.

In light of the findings, this thesis urges a redirection of the debate to the question of whether evidence exists to support the claim that further restriction of official immunities in cases of international crimes would do irreparable damage to interstate relations. The research

also urges a movement towards a balance between the preservation of interstate relations and the effective redress of human rights violations. In essence, therefore, while filling a gap in current legal debates, it promotes not mere rhetoric, but research-based scholarship on immunity-impunity discourse.

Chapter 1 is a general introduction of the subject, that is, the research, the history, and the purposes and challenges posed in contemporary legal literature. *Chapter 2* reviews the evolution of human rights protection since 1945 and notes the repression of criminality as the trend at the edge of this evolution. *Chapter 3* examines the notion of immunity from a post-modern perspective, defines key concepts, sets out the epistemological challenges, weighs the arguments for and against the removal of immunities, and at the same time solutions that can respect functional necessities of state officials. *Chapter IV*, the final chapter, evaluates the possible role of the International Criminal Court (ICC) in the immunity-impunity debate. As regards the scope of the study, this study is limited to consideration of the criminal responsibility of *incumbent* heads of state since they enjoy the most blanket form of immunities. The situations of other high-ranking officials who enjoy international immunity have also been covered by analogy.

In order to provide research that is action oriented, this thesis considers as a case in point the 4 March 2009 ICC international Warrant of Arrest issued for and currently standing against Sudan's incumbent president, Omar Hassan Al Bashir. I have injected critical legal analysis into the debate about the warrant in two ways. First, I look at the question of both the legality of and the state of execution of the ICC's arrest warrant, given Al Bashir's official position as president of a sovereign state who ordinarily is entitled to official immunity; Second, I consider the position of the ICC in light of the claim that it is a court without an enforcement mechanism or police force. These concerns are addressed in detail, and recommendations are offered. My

findings suggest that, in this immunity-impunity battle, there are many more political challenges than legal ones in the process of taking custody of incumbent heads of state. Unwavering commitment is required of the United Nations Security Council and of individual UN member states if the task against impunity is to emerge victorious. The finding is that the ICC provides the ultimate battleground for resolution of this matter, and the argument is made that the ICC is *not* inherently lacking in enforcement capabilities, as many scholars and practitioners seem to suggest. Rather, what has been lacking is the will of Rome Statute's "*enforcement pillar*" to effectively execute decisions that come from the Statute's "*judicial pillar*." The thesis presents this "two pillar system notion" and its inbuilt cooperation mechanisms by illustrating the case against Omar Al Bashir and particularly the obligation of states parties to give effect to the 4 March 2009 warrant of arrest. Analysis is provided that suggests how the tension with regard to immunity between Article 27 and Article 98 of the Rome Statute could be resolved.

The conclusion is drawn that both timely execution of arrest warrants and speedy trials are the essential components of any criminal justice system. Therefore it is recommended that members of the international community put aside the belief that immunity is responsible for interstate stability if there is no factual evidence to that effect. The recommendation is for the international community to be proactive in ending immunity by taking all measures necessary to give effect to arrest warrants that originate from international criminal tribunals/courts as if they were an *obligation erga omnes*. The conclusion is that solutions to the threat of interstate chaos lie not in absolute procedural immunity but rather elsewhere, that is, in utilizing existing normative frameworks in a manner that leaves major human rights violators no place to hide. The world would thus be a safer place for the travel of both heads of state and average citizens.

CHAPTER 1: INTRODUCTION

In legal scholarships, the prevailing view seems to be that official immunity doctrine and individual criminal responsibility are mutually exclusive norms—not at conflict.¹ This distinction is however, inaccurate if one examines the full impact of *immunity rationae personae* on the prosecution of serving heads of state. In international law, personal immunity does not only prohibit the prosecution of serving heads of state and other high ranking officials before foreign courts — as was affirmed by the International Court of Justice, in the case concerning the Arrest Warrant of April 11 2000 (DRC Congo v. Belgium,) the nature of the immunity also guarantees the absolute inviolability of the official from all coercive acts of foreign states.²

Given the above, a conundrum would arise in relations to states' execution of arrest warrants lawfully issued against incumbent heads of state by international criminal courts/tribunals dependent on individual states for the execution of their arrest warrants. In this case, is there a distinction to make between immunity from prosecution in the vertical context and immunity from arrest in the horizontal context when international criminal tribunals with jurisdiction lawfully seek the arrest of indicted leaders? Professor Paola Gaeta³ and many others international law scholars⁴ think there is there is a distinction to be made. This view has also

¹See, e.g. Cassese Antonio “When Senior State Officials May Be Tried For International Crimes? Some Comments on the Congo v. Belgium Case”, *European Journal of International Law*, 13(2002) 853, also see Bankas, Ernest K. “The State Immunity Controversy in International Law : Private Suits Against Sovereign States in Domestic Courts.” (Berlin; New York Springer, 2005), see Brohmer Jürgen “State Immunity and the Violation of Human Rights” (The Hague; Boston: Kluwer Academic Publisher, 1997)9. See The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2002] I.C.J. Rep. 3 I.L.M. 536 [Congo v. Belgium cited to I.C.J. Rep at para 60, the court stated “Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.”

² Id., *The Arrest Warrant Case* para 58

³ Paola Gaeta “Does President Al Bashir Enjoy Immunity from Arrest?” *Journal of International Criminal Justice*, Volume 7 (2009) Issue 2 Oxford University Press, 2009, pg 325.

⁴ See e.g. Lucas Buzzard “Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir” *American University International Law Review* 2009 24 Am. U. Int'l L. Rev. 897.

been echoed by the ICJ.⁵ Precisely therefore, immunity although claimed to be a procedural rule⁶ becomes not the handmaiden of justice but a rule that unduly burdens the prosecution of suspects in leadership positions.

As a matter of methodology, this work drew on a host of legal literature and jurisprudence on the subject of official immunities and the prosecution of heads of states—current and former. Recent studies, such as the Ellen Lutz and Caitlin Reiger’s collection of case studies on Prosecuting Heads of State, reveals that “[o]ut of ninety-nine indictments against sixty-seven heads of state or government, only seventeen served some form of sentence.”⁷ In other words, demonstrating that what may appear as a promising rise in state leaders’ indictments in recent years, is in reality a smokes screen.

On the other hand, the International Law Commission’s (ILC) May 2008 preliminary report on the draft UN Convention on Immunity of State Official from Foreign Jurisdiction indicates that absolute personal immunity appears to be well received by the majority of states., as states have urged the Commission to accord “due priority [...] to the need for State officials to enjoy such immunity, for the sake of stable relations among States.”⁸ To the aid of the leaders of some states, such loosely regulated protections have become an incentive to cling to state power in perpetuity.⁹ The effect may be a spiral of wrongdoing, that by and large leaves continuing violations unchecked and the victims without meaningful avenues for redress. This, moreover, occurs in the face of an overarching normative human rights framework that confers absolute

⁵ See The Arrest Warrant Case, Para 54

⁶ Id., para 58

⁷ Ellen L. Lutz and Caitlin Reiger “Prosecuting Heads of State”, (eds). (New York: Cambridge University Press, 2009) page 14.

⁸ International Law Commission [ILC], Preliminary report on Immunity of State officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/601 (May 29, 2008) (prepared by Special Rapporteur Roman Anatolevich Kolodkin).

⁹ See David M Crane “From Karadzic to Omar Bashir” *New York Times*, Excerpts, July 24, 2008, also see Al Bashir’s recent bid for a re-election despite the grave charges standing against him.

jurisdiction over such crimes and provides an unequivocal mandate to states that they may disregard the official positions of offenders in such circumstances. As the drafting process continues on the Convention on Immunity of State Officials from Foreign Criminal Jurisdiction, one is right to be sceptical of the outcome of such a law, given the strong insistence of states that they retain official immunity.¹⁰ The 2004 United Nations Convention on the Jurisdictional Immunity of States and Their Property already ignored human rights questions on the list of exceptions to state immunity.¹¹ This would be the second normative blow in less than a decade.

Just during the past two decades, none of several civil torture claims brought against incumbent heads of states in foreign courts was successful. This lack of success ranges from the unfortunate decision in *Al Adsani v. The United Kingdom*,¹² which went to the European Court of Human Rights, to the torture claim in *Tachiona v. Mugabe*,¹³ and, previously, to *Lafontant v. Aristide*¹⁴ in the U.S, to *Douzard v. The Republic of Iran* in the Ontario Superior Court¹⁵, and to *Jones v. Saudi Arabia* in the United Kingdom in 2006.¹⁶ In all the above civil claims, absolute procedural immunity was unequivocally upheld. In the criminal arena, the option to pursue redress against incumbent heads of state in foreign state venues has also been denied. The most well known example of this is, the April 11 Arrest Warrant case, when Belgium sought to implement universal jurisdiction over the war crimes allegedly committed by Congo's Minister of Foreign Affairs, Mr. Yerodia Abdulaye. This initiative resulted in the International Court of

¹⁰ See UN Doc (A/CN.4/577, para. 126.). The UN General Assembly expects the ILC, in its work on the ongoing draft to accord "due priority [...] to the need for State officials to enjoy such immunity, for the sake of stable relations among States."

¹¹ see Christopher Keith Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol" (2006) 55 ICLQ 411-426; Lorna McGregor, "State Immunity and Jus Cogens" (2006) 55 ICLQ 437-445.

¹² See *Al-Adsani v. United (No.2)* (35763/97) European Court of Human Rights 21 November 2001 paras 35 – 41

¹³ See *Tachiona v. Mugabe*, 00 Civ. 6666 (US District Court So. District of NY 2001).

¹⁴ See *Lafontant v. Aristide*, 844 F. Supp. 12 (US E.D. NY 1994)

¹⁵ See *Bouzari v. Islamic Republic of Iran*, Ontario Superior Court of Justice (01.05.02) 114 A.C.W.S.(3d) 57; 2002

¹⁶ See *Jones v. Saudi Arabia* [2006]UKHL 26

Justice (ICJ) 2002 Arrest Warrant decision in the DRC Congo *v.* Belgium.¹⁷ Due to the lack of hard law (treaty law) on the subject, the ICJ relied on *state practice* to hold that, under international law, as it then was (and today still could be), it has been “*firmly established*” that, in the absence of a state waiver, an incumbent head of state is immune from both criminal and civil proceedings before the courts of another state, even if he or she is accused of *jus cogens* crimes such as genocide, war crimes, and crimes against humanity.¹⁸ The decision went on to state that.

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.¹⁹

This opinion today forms the basis for the argument that international human rights instruments do not empower states to disregard the immunity of heads of state, even if they are accused of genocide and other international crimes. This view and that of the ICJ are strongly criticized in this paper on many grounds. The reliance solely on *state practices*, in my view, is not a sound foundation for the current state of the law on official immunity. It is unrealistic to expect state rulers to engage in practices that would lift immunity for themselves and leave them open to criminal investigation. The practice of the Nuremberg Tribunals, where the first rejection of the doctrine occurred at a international judicial forum and where the defence of head-of-state immunity was treated as a “relic of the doctrine of the Divine King,”²⁰ can be a foundation for the argument that the “king can do no wrong” mentality should not be clothed in modern intellectual theories in order to insulate leaders from prosecution. This paper has established and thus urges stronger initiatives, if state leaders are to be brought to justice.

¹⁷ See the Case Concerning the Arrest Warrant of April 11 2000, decision of the ICJ of Feb 2002

¹⁸ *Id.*, para 59

¹⁹ *Supra* The Arrest Warrant Case para 59 (DRC Congo *v.* Belgium)

²⁰ See Robert Jackson, “Report to the President” (1945) 39 *AJIL*, 178, 182

1.1 Summary Layout of Thesis

The thesis is structured as follows: Chapter I presents a general introduction to the subject of the research through a review of its history, its purpose, challenges, and discussion in contemporary legal literature. Chapter 2 examines evolving international legal responses to the need to redress human rights violations, with an emphasis on the five stages that have shaped human rights law; that is, the “enunciative stage,” the “declaratory stage,” the “prescriptive stage,” the “enforcement stage,” and, lastly, the “criminalization stage,” in which certain actions have today come to be seen as the core of international crimes. Chapter 3 takes on the notion of immunity from a post-modern perspective, redefines key concepts, and weighs the arguments for and against removal of immunities, while functional necessity is preserved. There is a discussion of the theories underpinning immunity, although increasingly losing modern acceptance. Finally, Part IV explores the potential within the Rome Statute system for trying an incumbent head of state and offers new ways for resolving conflicts emerging from the seemingly contradictory provisions of Article 98 and 27, particularly with regard to the current legal absurdity that is obstructing the arrest and surrender of Omar Al Bashir of Sudan to the International Criminal Court.

CHAPTER 2: A CRIMINAL REPRESSION OF HUMAN RIGHTS VIOLATIONS: TOWARDS ENFORCEMENT

2.1 Redress of Human Rights Violations in the Post 1945 Era

In the pre-World War II era (and at least during the first decade after World War II), redress of human rights violations, regardless of the gravity of the abuses, was left to individual states and their respective internal domestic legal regimes.²¹ It did not matter then, as it does today, that the state in question is unwilling or unable to redress a violation or that its internal redress was inadequate.²² International law simply did not offer an alternative. Peter Malanczuk describes the above era as a period when “the relationship between states and their own nationals was considered as [purely] an internal matter.”²³ The focus on absolute sovereignty, which prevailed at the time, signalled a non-interference approach to events occurring within the territory of another state.

Also, this was period of infancy in the development of international law. In fact some scholars doubted if ‘international law’ was valid ‘law’ in the strictest sense. Such scholars include John Austin (1790-1859).²⁴ To Austin, anything other than “the general command of a sovereign, supported by the threats of sanction”²⁵ was not law. In his view, international law did

²¹ See Peter Malanczuk, “Akehurst Akehurst's Modern Introduction to International Law” 7th revised ed. (London/New York: Routledge, 1997) pg 209. See François Rigaux “Han Kelsen on International Law” *European Journal of International Law* (1998) 2 pg 325 discussing Kelsen's monist theory in which he argued that no municipal matter regulated at the municipal sphere is outside the regulatory powers of international law. For further discussion also see Jose .E. Alveraz, “International Organization As Law-Makers, Oxford University Press 200.

²² See Wolfgang Kaleck, Michael Ratner, Tobias Singelstein and Peter Weiss (eds), *International Prosecution of Human Rights Crimes Human Rights Law Review* (2008) 8(3): 571-577. Also see Cancado Trindade, Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century, 8 TUL. J. INT'L & COMP. L. 5(2000): 40-46

²³ Supra Malanczuk 8 edition pages 209-211

²⁴ See Peter Malanczuk, loc., cit., fn 27 pages 17.

²⁵ Id.,

not meet this definition.²⁶ However, this is not to say that scholars who believed in the validity of international law saw it as a wholly encompassing regime. Lassa Oppenheim (a strong supporter of international law) wrote in 1912 that international law is “a law not of individual human beings” but of “individual States.”²⁷ Hans Kelsen followed in 1952 with a similar view.²⁸ In Kelsen’s opinion, international law by definition is an “inter-state [type of] law”²⁹ designed to “regulate and govern the relationship between States.”³⁰ This relationship excluded internal relationship however hostile existing between that state and its inhabitants.

Considered on its own, human rights as a theory also had some major conceptual hindrances, some of which stunted its growth even during the post-WWII era, when a new and a much more vibrant international legal order was established under the auspices of the United Nations. Besides the jurisprudential and theoretical controversies about what constituted a “human right,”³¹ the linking of human rights to “morality” made it even much difficult for human rights to be perceived as strictly a legal concept. Made even more complex, human rights as we understand today did not take off as a claim enforceable at international law.³²

The current International Bill of Rights,³³ which originated during the post-World War II era through the adoption of the Universal Declaration of Human Rights (UHDR) in 1948,

²⁶ *Id.*, pg 17.

²⁷ Jennings and Watts edition, Oppenheim’s International Law, vol. 1 (2008) Oxford Publishers. Oppenheim wrote; “since the law of nations is based on common consent of individual States, and not of individual human beings, States, solely and exclusively are subjects of international law.”

²⁸ See Hans Kelsen Principles of International Law (1952) pg 201 New York: Rinehart & Company, Inc. [1952]. xvii, 461 pp. Reprinted 2003 by The Lawbook Exchange, Ltd. ISBN 1-58477-325-1.

²⁹ *Id.*, pg 201

³⁰ *Id.*,

³¹ Maurice Cranston, What Are Human Rights? (London: Bodley Head, (1973), See Moses Moskowitz, The Politics and Dynamics of Human Rights (New York: Oceana Publications, Inc., 1968) 98.

³² *Id.*, *supra* fn 27., Malanczuk cautioned that international human rights treaties should be interpreted with care because they may simply be providing “benefits” other than “rights”. Also See Ronald Dworkin, Taking Rights Seriously (1977); See also, M. CRANSTON, What Are Human Rights? (London: Bodley Head, (1973).

³³ The International Bill of Rights consists of three main international human rights instruments, namely; the Human Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

emerged in the form of an expression of an understanding towards a “common standard for the practice of a norm”³⁴ rather than as an establishment of a “legal right” in the proper sense, and, moreover, was presented in a nonbinding “declaration.”³⁵ At the time of its adoption, states took the UDHR at its face value as merely “a statement of principle and common standard for achieving human rights and freedoms for all peoples and nations.”³⁶ This declaration could not in itself import an internationally justiciable legal claim, nor could it in itself provide a legal basis for remedying human rights violations at international law. Even if the claims in the UDHR were to be considered justiciable, there was not a single court that had the adjudicatorial competence to hear such claims on the international plane. The International Court of Justice (ICJ), which was established by the Charter of the UN in 1945, for example expressly restricted access to the court only to states in its Article 34 (1).³⁷ Thus victims of human rights violations could not take cases against their state(s) to the ICJ when, in the process of its creation, it was denied such jurisdiction.

Yet in a world shocked and still threatened by the horrors of World War II and the Holocaust, a decision to leave redress for human rights violations in the hands of individual states would be illogical. Moreover, many world leaders knew very well even from their pre-World War II experiences that there were regimes determined to pursue deliberate policies of repression that would result in gross human rights violations and also affect both the security of neighbouring states and international peace. Such states, in the words of Lord Browne-Wilkinson

³⁴ The preamble of the UDHR provides that “Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations.....”

³⁵ ³⁵ The Universal Declaration of Human Rights was adopted on December 10, 1948, <http://www.un.org/en/documents/udhr/> (Last visited Oct 29 2009)

³⁶ Id., Also see UN Secretary General remarks in 1971 U Thant at

³⁷ Article 34 (1) of the Statute of the International Court of justice provides that “Only states may be parties in cases before the Court.”

in Pinochet's case, "were never prepared to adjudicate over the shortcomings of their own regimes."³⁸

Thus, the Charter of Nuremberg of 1946 (although then with questionable legitimacy) arose, to claim in the name of "upholding international law" an international military adjudicating role in the trials of individual perpetrators of the atrocities of World War II.³⁹ According to Nuremberg's Chief Prosecutor Robert Jackson, "[it is]... and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁴⁰ Nuremberg took root as the first successful attempt at enforcement of "international law" in relation to gross human rights violations that were addressed at the international plane as a matter of international law.⁴¹

Doubts about the Nuremberg Charter and questions about its authority to try nationals of states that had not consented to its jurisdiction dissipated when the United Nations directed the International Law Commission to codify the Nuremberg Principles and Judgement, which was adopted by the United Nations General Assembly on 11 December 1946.⁴² Since then, questions about redressing human rights violations at the level of international law have taken a new direction. In 1948 and 1949, two major international instruments emerged that provided for protection of human rights as matter of international law. The first was the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (hereinafter

³⁸ Lord Browne-Wilkinson Opinion of the Lords of Appeal for Judgment in the cause Regina v. Bartle and The Commissioner of Police for the Metropolis and ors (Appellants) Ex Parte Pinochet of 24 March 1999 pg 6.

³⁹ See Maurizio Ragazzi "The Concept of International Obligations Erga Omnes", Oxford monograph of International, (1997) pg 97 Oxford University Press.

⁴⁰ See Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes 2008, Springers-verlag Berlin Heidelberg, pg 3 quoting decision of the International Military Tribunal, Trial of Major War Criminals before IMT, Nuremberg, (14 Nov, 1945-Oct 1946) p. 41.

⁴¹ Noting that the attempt to try the German Emperor after WWI aborted because the Emperor took refuge in Netherlands and was never handed over for trial.

⁴² See Lord Browne-Wilkinson Opinion speech in Pinochet case cited earlier, pg 6

called the Genocide Convention),⁴³ which overtly declared that genocide, whether “committed in peace time or war time,” is an “international crime.”⁴⁴ In its Article IV, the Convention opened the door to trials of persons accused of committing genocide before international tribunals⁴⁵; additionally it provided that the official position of the perpetrator would neither be a defence nor a justification for non punishment.⁴⁶ And the second instrument was the Geneva Convention (IV), which was adopted in 1949 to provide specific protection relating to treatment of civilians in war time and in situations of occupation by foreign powers (that is, occupation of territories even when there is no war).⁴⁷ The Convention, when considered together with its two Additional Protocols of 1977, provided for a universal jurisdiction over war crimes and crimes against humanity, with provision for the trial of wrongs such as rape, murder, torture, and child soldiering committed by any contracting state parties.⁴⁸ Thus, from that point onward, systematic, mass violations of human rights were categorized as international crimes, either as crimes of genocide, which by definition can occur either in a time of peace or war,⁴⁹ or as war crimes and crimes against humanity, which by definition may occur in war time and also in times

⁴³ Unanimously adopted without abstention by UN GA Resolution 260 (III) A of the UN General Assembly on 9 Dec 1948, entered into force on 12 Jan 1952.

⁴⁴ Article 1 of the Convention read together with Paragraph one of the preamble which reads “..Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.

⁴⁵ Article VI provides that: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

⁴⁶ Article IV provide that “Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

⁴⁷ See Article 1, 2, 3-39 and 40-67. And for occupied territories see Section III Also for detailed discussion of the Convention also see ICRC website at <http://www.icrc.org/web/Eng/siteeng0.nsf/html/genevaconventions>

⁴⁸ The Geneva Conventions declared that each party "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts." This language implies universal jurisdiction for the prosecution of war crimes, placing the same obligation to prosecute on the country in which the crimes took place as on other countries

⁴⁹ Article 1 of the Convention read together with Paragraph one of the preamble which reads “..Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime contrary to the spirit and aims of the United Nations.

of occupation.⁵⁰ The crimes in both conventions are listed among the core crimes in Article 8 of the Rome Statute of 1998, for which the International Criminal Court has jurisdiction.⁵¹

A third crucial human rights instrument that is credited for the ever growing legal significance of human rights redress on the international plane is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter called the Torture Convention) of 1984.⁵² This convention was the principle legal framework behind the extradition of Augusto Pinochet, which occurred in London in 1998/1999.⁵³ As Lord Browne-Wilkinson observed in his speech, “[...] the objective of [accrediting torture as an international crime] was to ensure a general jurisdiction so that the torturer was not safe wherever he went.”⁵⁴ Like the two previous crimes discussed above, torture also falls under the category of *jus cogens* crime⁵⁵ and, as correctly stated by the English Law Lord, “[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.”⁵⁶ This view was echoed in *Demeanour v. Petro sky*, in the observation that offences *jus cogens* are punishable by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”⁵⁷

⁵⁰ Article 1, 2, 3-39 and 40-67. And for occupied territories see Section III Also for detailed discussion of the Convention also see ICRC website at <http://www.icrc.org/genevaconventions> (Last visited Oct 2009)

⁵¹ See Article 8 of the Rome Statute.

⁵² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“hereinafter the Torture Convention”) adopted on 10 Dec 1984, Meering no 93, A/RES/39/46. <http://www.un.org/documents/ga/res/39/a39r046.htm> (Last visited Oct 29 2009).

⁵³ *Regina v. Bartle and The Commissioner of Police for the Metropolis and ors Ex Parte No3 Pinochet*

⁵⁴ Supra See Lord Browne-Wilkinson’s speech at pg 7 (Pinochet 3).

⁵⁵ Article 53 of The Vienna Convention on the law of Treaties, defines *Jus cogens* or peremptory norm “ [as] 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” Vienna Convention on the law of Treaties, Article 53.

⁵⁶ Id., pg 7

⁵⁷ *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 57 United States Court of Appeal Decision.

The challenges in applying universal jurisdiction in relation to the above three jus cogens norms are numerous, and the most problematic among them is the doctrine of official immunity, which is the main theme of this thesis. As first noted in the Arrest Warrant case⁵⁸ and later in the unsuccessful civil claim for torture in *Al-Adsani v. United Kingdom*,⁵⁹ in *Jones v. Saudi Arabia* [2006]⁶⁰ before the House of Lords in the United Kingdom, and in the U.S. cases of *Tachiona v. Mugabe*⁶¹ and *Lafontant v. Aristide*,⁶² it seems clear that jus cogens norms, despite the normative hierarchy theory, are still lagging behind the doctrine of official immunity. This conclusion can be drawn from the ICJ Arrest Warrant decision, which ruled that “the various international conventions on the prevention and punishment of certain serious crimes [...] in no way affects immunities under customary international law[...] even where those courts exercise such a jurisdiction under these conventions.”⁶³

In conclusion, contemporary human rights have come a long way in the acquisition of marked and ever increasing legal importance,⁶⁴ albeit amid major obstacles. Cherif Bassiouni⁶⁵ sums up the evolution of human rights as occurring in five stages. The first was the “enunciative stage,” where universally shared values were identified. Then came the “declaratory stage,” in which the values identified were declared in more general terms in international instruments. From this process arose the “prescriptive stage,” when general values became more specific and became enacted in binding conventions. During the subsequent “enforcement stage,” modalities

⁵⁸ See Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2002 General List No. 121 (International Court of Justice), available at <http://icj-cij.org>.

⁵⁹ *Al-Adsani v. United Kingdom* (No. 2) (35763/97) European Court of Human Rights 21 November 2001 paras 35 – 41; The claimant, a torture victim by the Government of Kuwait was denied civil compensation in the UK courts on the grounds of the immunity.

⁶⁰ *Jones v. Saudi Arabia* [2006] UKHL 26

⁶¹ *Tachiona v. Mugabe*, 00 Civ. 6666 (US District Court So. District of NY 2001).

⁶² *Lafontant v. Aristide*, 844 F. Supp. 12 (US E.D. NY 1994).

⁶³ *Supra The Arrest Warrant Case* para 59

⁶⁴ See the 1971 Address by then UN Secretary General U Thant at United Nations Actions in the Field of Human Rights (New York United Nations. 1983. UN Doc. ST/HR/2/Rev.2 UN Sales No. E.83.XIV 2. Chap II para 67.14

⁶⁵ See Excerpts from M. Cherif Bassiouni, *International Criminal Law and Human Rights*, 9 YALE J. OF WORLD PUBL. ORDER 193 (1982), in D'Amato (ed. 1994), pp. 227-229

of enforcement were put in place. The fifth stage is the “criminalization stage”; during this stage, penalties are prescribed in international law for the violation of certain legally binding rights. This stage appears to be where international community is currently at, as will be illustrated in the next section (2.2).

2.2 The Emerging International Criminal Law: Roles and Potentials

The past two decades, is witnessing a steady growth in legal scholarship discussing an emerging discipline within the corpus of public international law developing a fully-fledged criminal regime of international law. To a number of scholars, this contemporary establishment, termed International Criminal Law (ICL), has developed gradually.⁶⁶ Antonio Cassese, writing in 2008, observes that, although ICL has a history that dates back to the 1945/1946 Trials of Nuremberg, it is “a relatively new branch of Public in International Law”⁶⁷ and still is in the “rudimentary stage.”⁶⁸ Swanepoel⁶⁹ and Damgaard⁷⁰ expresses similar views in separate scholarly works in 2006 and 2008 respectively, albeit according to Swanepoel, ICL could have been 175 years old had its growth not been stunted by “the absence of an international criminal judicial forum and the reluctance of nations to prosecute perpetrators of international crimes.”⁷¹

⁶⁶See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst “An Introduction to International Criminal Law and Procedure”(London Cambridge University Press,2007) pg,5.,also see Antonio Cassese, “International Criminal law”,2nd., edn.(London, Oxford University Press, 2008) pg4, also see Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes (2008 Springer-Verlag Berlin Heidelberg) 28, also see Georg Schwarzenberger, “The Problem of an International Criminal Law” (1950)3 Current Legal Problems 263”, Robert Jennings and Arthur Watts (eds), Oppenheim’s International Law (9th edn, London, 1994) 5-7.

⁶⁷Antonio Cassese, International Criminal law, Second Edition (Oxford) University Press, 2008)4

⁶⁸ Id., loc. page 4

⁶⁹Cornelis Francois Swanepoel “The Emergence of Modern International Criminal Justice Order” (2006) Doctoral Thesis submitted to Department of Procedural Law and Law of Evidence at the University of Free State May 2006.

⁷⁰Damgaard, loc. cit., fn 74, pg 28

⁷¹Swanepoel loc.,cit., fn 80, pg 21.

The possibility of ICL being any older, however, is refuted by Schwarzenberger, a renowned ICL scholar, who writing in 1947 argued that ICL did not exist at the time; “[a]n international crime,” he said when referring to the question of aggression,⁷² “presupposes the existence of an international criminal law. Such a branch of international law does not exist.”⁷³ The above view would be in agreement with that espoused by U.S. Judge (retired) Norbert Ehrenfreund, who remarked in his 2005 speech, “Reflection on the Nuremberg Trial”, that during

That summer of 1945 the representatives of the four Allied powers ... met in London to decide if there should be an international trial....There was no law. There was no court. There was no jurisdiction. They had to write the laws. They had to write the statutes that fit the crimes. They had to draft the penalties that went with those crimes.⁷⁴

Ehrenfreund also argued that this lack was the reason why the Charter of Nuremberg had to be applied retroactively (*ex post facto*) as there were no international criminal statutes under which the atrocities of World War II could have been tried.⁷⁵ While these views raise interesting scholarly view points, suggesting that Nuremberg was applying new law and not existing law would fly in the face of the mass of scholarship used in the drafting of the Nuremberg Charter. The arguments posited by both Schwarzenberger and Ehrenfreund therefore are debatable, especially considering the above comment.

Therefore, while we should regard ICL as a development in progress, nevertheless it is in itself not a self-contained regime. ICL was conceived and has continued to grow under the broad umbrella of public international law. In Cassese’s views, ICL can be defined as “a body of international rules designed to both proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression and terrorism) and to make those who engage in

⁷² The crime of “Aggression” is known to be a new name for the old “crime against peace”

⁷³ Georg Schwarzenberger, “The Judgment of Nuremberg” (1947) 21 *Tulane Law Review* 329 at 349.

⁷⁴ Remarks of Norbert Ehrenfreund, “Reflection on Nuremberg Trial” June 13, 2005 Transcribed by Charlene J. Peterson, 2005 www.robertjackson.org (Last visited Oct 29, 2009).

⁷⁵ *Id.*,

such conducts criminally liable.”⁷⁶ Cassese adds that the list of “acts for whose accomplishment international law makes the author criminally responsible has come into being by gradual accretion.”⁷⁷ The other suggested definition is by Robert Cryer, who defines international crimes as “those offences over which international courts or tribunals have been given jurisdiction under general international law.”⁷⁸ Wise, who espouses a similar view, wrote in 2006 that “[i]n the strictest sense, international criminal law would be the law applicable to international criminal courts.”⁷⁹ On ICL crimes, Cryer considers that the sources of ICL crimes are varied. He states that “[w]ar crimes [for example] originate from the laws and customs of war,”⁸⁰ and that “[g]enocide and crimes against humanity evolved to protect persons from gross human rights abuses including those committed by their own governments.” Aggression, he notes, is a matter of interstate conflict.⁸¹

Interestingly, almost all ICL crimes and their constitutive elements are human-rights right centered. The International Tribunal for the former Yugoslavia (ICTY) Appeal Chamber in *Prosecutor v. Dusko Tadic* drew this link when it noted that: “A State-sovereign-oriented approach has been gradually supplanted by a human-rights-oriented-approach [...]”⁸² The Tribunal added that “International law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings[.]” This in my opinion, gives ICL two key human rights-oriented potential: (i) the potential to impress upon states the need to criminally prosecute and thereby repress human rights violations occurring in their territories,

⁷⁶ Id., page 4

⁷⁷ Id., page 4

⁷⁸ Cryer loc., cit., fn 74 page 2

⁷⁹ Wise E.M et al “International Criminal Law: Cases and Materials.” (New York, 2000) 4. The above views, however, do not treat the laws of criminal tribunals or courts as the primary source of ICL. On the contrary, as noted by Cassese, Damgaard, and Cryer, there should be regard given to Article 38 of the Statute of the International Court of Justice, and to the hierarchy stipulated therein.

⁸⁰ Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmschurst, loc. cit., fn. 74 page 1

⁸¹ Id., pg 1

⁸² Tadic case ICTY 1995 para 97

and (ii) through its growing system of international criminal tribunals and courts, ICL could further increase its role in directly prosecuting and punishing individuals, including high-ranking governmental officials culpable in the commission of grave crimes. Given the above, the nature and purpose of ICL have in many ways led it to resolutely depart from the traditional conception of international law. The “*subjects*” it seeks to protect are not the “*subjects*” that conventional international law traditionally aimed to protect.⁸³ ICL is asserting the increasing importance of the “individual human being” and making major inroads into traditionally sacred spheres such as sovereignty in order to fulfill these mandates. It has criminalized and continues to criminalize acts and or omissions which in conventional international law would have been regarded merely as wrongful acts attributable only to the state. This growth, most of which dates back just to the post-World War II era, has arisen from both the lessons of the past and the need to secure the future. The first lesson as discussed in Chapter 2.1 is that, oppressive regimes do not fairly adjudicate their own shortcomings. Thus crimes by such a regime’s leadership would for the most part never get prosecuted. Second is that there is a close linkage between human rights and international peace and security.⁸⁴ In fact the two are dependent variables.⁸⁵ Third, the perception of international law is changing, and new actors, new rights bearers and new law makers⁸⁶ are emerging. With this new rise, upholding individual rights as a matter of international demands a criminal repression of violations. Lastly, as new crimes that are prevalent in the present time get added to ICL lists, traditional crimes are also being revisited, with an emphasis being placed on

⁸³ Note that states traditionally enjoyed exclusive monopoly over international law

⁸⁴ Article 1(3) of the Charter. To achieve international co-operation [...]in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction[...]

⁸⁵ Id., For further discussion see Chapter II.

⁸⁶ See Jose .E. Alveraz “International Organization as Law-Makers” (Oxford University Press, New York , 2005) Rep 2006

“core international crimes shocking to the conscience of humanity.”⁸⁷ As is illustrated in this and the previous chapter, how to better enforce human rights is increasingly becoming the universal priority.⁸⁸ This explains the increasing shift to the concept of individual criminal responsibility at international law.

2.3 Increasing Focus on Individual Criminal Responsibility

The idea that the state as an abstract entity should be kept separate from crimes so that individual perpetrator(s) bear direct responsibility for international crimes is a notion that has grown alongside International Criminal Law, particularly through major legal developments, some of which were discussed in the previous sections. The trials at Nuremberg was perhaps the first to proclaim that “crimes against international law are committed by men, not by abstract entities, and [that it is] only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁸⁹

This proclamation arose because of the gaps in the traditional perception of state responsibility which placed responsibility for “international wrong doing” squarely on the perpetrator’s state, with the assumption that domestic laws would punish the perpetrators.⁹⁰ For the most parts, domestic laws proved impotent. Second, as Cassese correctly notes, “without attributing acts of crimes directly to their individual authors, it would [be] impossible to

⁸⁷ This probably explains why piracy although one of the oldest international crimes is not among the crimes within the jurisdiction of the nascent International Criminal Court (ICC). Some commentators argue that piracy has become obsolete as it does not meet the modern requirement of international crimes.

⁸⁸ This is not to say that piracy did not have an element of human rights violation, that act in fact had an element of murder, rape among its constitute character. The only difference is that piracy would no longer shock the conscience of humanity as much as genocide and other war crimes do in the present-day.

⁸⁹ Judgment of the International Military Tribunal, (IMT) Trial of Major Criminals before the IMT, Nuremberg (14 Nov. 1945-Oct 1945. Also See United Nations General Assembly Resolution 177 (II), paragraph (a).

⁹⁰ See Antonio Cassese, *International Criminal law*, (Oxford, 2008) 2 edn pg 33

determine the subjective and objective element of crimes (mensrea and actus rea).”⁹¹ This is the general principle encapsulated in the Latin maxim *nulla poena sine culpa*:

that no one may be held accountable for acts he/she has not performed or in the commission of which he/she has not in some way participated, or for an omission that cannot be attributed to him/her.⁹²

With reference to this notion, Clara Damgaard defines individual criminal responsibility by splitting the term into two parts, that is “individual[ly]” and “criminal responsibility.”⁹³ To Damgaard, the word “individual” in criminal law denotes a “natural person” and not entities such as corporations or states.⁹⁴ She thus defines individual criminal responsibility as:-

a phrase commonly employed to describe the scenario where an individual is criminally responsible for his own unlawful actions, as opposed to being criminally responsible for the unlawful actions of others, which is encompassed in the term “collective responsibility.”⁹⁵

Critics of this notion argue that overemphasis on individual criminal responsibility negates the significance and relevance of collective complicity in crime [...] ⁹⁶One such critic, Stefano Manacorda, opines that traditional criminal law [...] built on a “mononuclear paradigm of one author, one fact, one victim”⁹⁷ raises difficulties in applying individual criminal responsibility to international crimes in that “such categorization cannot account for macro criminality as individual criminal responsibility as a principle [would be] inadequate for explaining collective criminality.”⁹⁸ This position, however, still leaves open one recurring question. By definition, collective criminality implies the existence of individual criminality. The question thus is, of the two which level would best serve the deterrence goal of criminal justice.

⁹¹ Attonio Cassee Supra page 36

⁹² *Id.*, pg 33

⁹³ Clara Damgaard, “Individual Criminal Responsibility for Core International Crimes”(Berlin: Springer-verlag Heidelberg, 2008) 12

⁹⁴ *Id.*,pg 12

⁹⁵ *Id.*, pg 13

⁹⁶ Javid Gadirov “ Mapping Criminal Justice” Supra page 1

⁹⁷ Stefano Manacorda “The Principle of Individual Criminal Responsibility,” A Conceptual Framework Journal of International Criminal Justice 5 (2007), 913-915.

⁹⁸ *Id.*,,

The prevailing view has been that the deterrent goal of criminal law is better served when “each person’s criminal liability reflects the person’s individual culpability”⁹⁹; proponents of collective responsibility are yet to convincingly counter this view.

This was the position the framers of the Principles of Nuremberg adopted in recognizing the importance of assigning responsibility individually for international crimes. On this basis, the Principles of International Law Recognized in the Charter of the Nuremberg were formulated.¹⁰⁰ With their adoption, these principles became part of international law.¹⁰¹ At the heart of these principles was the affirmation in Principle III and IV¹⁰² that official capacity of an offender does not relieve him/her from responsibility under international law.¹⁰³ This ideal have inspired the birth of other international criminal tribunals or courts, which have built on the Nuremberg Judgments and Principles and adopted governing statutes that reinforce the principle of individual criminal responsibility for core international crimes with regards to high ranking state officials. These tribunals include the ICTY¹⁰⁴, ICTR,¹⁰⁵ and the ICC.¹⁰⁶

In addition, the recent ILC’s May 2008 preliminary report of the Rapporteur on the “Immunity of State officials from Foreign Criminal Jurisdiction” reiterated the above principle.

⁹⁹ *Supra* Vittorio Emanuele Orlando Challenging International Criminal Justice On the Aborted Decision to Bring the German Emperor to Trial.

¹⁰⁰ See United Nations General Assembly Resolution 177 (II), paragraph (a). GA Res 95, UN GAOR, 1st Session, UN Doc A/64/Add 1 (1946).

¹⁰¹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the United Nations in 1950. The principles can be found on <http://deoxy.org/wc/wc-nurem.htm> (Last visited Oct 29, 09).

¹⁰² *Id.*, Principle iv, states that 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 to him

¹⁰³ *Id.*, see Principle III

¹⁰⁴ Article 6 of ICTY Statute. For details information on ICTY see www.icty.org (Last visited Oct 2009)

¹⁰⁵ Article 6 of ICTR Statute, See www.unict.org (Last visited Oct 2009)

¹⁰⁶ Article 25 of The Rome Statute of the International Criminal Court, www.icc-cpi.int/menus/icc (Last visited Oct 2009), also see Gerhard Werle “Individual Criminal Responsibility in Article 25 ICC Statute” *Journal of International Criminal Justice* 5 no. 4(2007)953-975.

The report stated that “criminal jurisdiction is exercised only over individuals and not over the State [...] A State, unlike an individual, does not incur criminal responsibility.”¹⁰⁷

The same observation was made by Lord Bingham in the 2006 decision on *Jones v. Ministry of Interior*.¹⁰⁸ The Law Lord stated that “a state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal prosecution.”¹⁰⁹ Thus individual is a well rooted criminal law notion.

2.4 Culpability of Heads of State for Human Rights Violations

As discussed above, crime is individual. This is the main theoretical assumption of the rule of law; that the law applies equally to all persons without any distinction.¹¹⁰ Justice George Kanyeihamba contends that, the core of assumption of the rule of law is that “both the rulers and the governed are equally subject to the same law of the land.”¹¹¹ However, it immediately becomes unclear how immunity vested in heads of state by reason of their office co-exist with the above theoretical assumption. But, rule of law has been defined in many ways. The UN’s definition of the rule of law, for example, has introduced the element of the necessary compliance of domestic laws with international law.¹¹² Thus, if immunity is a concept of

¹⁰⁷ International Law Commission [ILC], Preliminary report on immunity of State officials from foreign criminal jurisdiction, U.N. Doc. A/CN.4/601 (May 29, 2008) (prepared by Special Rapporteur Roman Anatolevich Kolodkin).

¹⁰⁸ *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*. Case No. [2006] UKHL 26. At <<http://www.publications.parliament.uk/pa/ld/ldjudgment.htm> . State.

¹⁰⁹ *Id.*, As per Lord Bingham of Cornhill. It is important to note however that the use of the word “directly” would give effect to indirect nature of a criminal proceeding on a

¹¹⁰ G.W. KANYEIHAMBA “The Doctrine of Separation of Power in Theory and Practice”: Challenges and Opportunities, presented at the symposium on the Rule of Law, Human Rights and Constitutionalism Harare, Zimbabwe, 1-4 November 2007. Pg 17

¹¹¹ *Id.*, pg 17

¹¹² See Strengthening the Rule of Law, Kofi Annan’s definition of the rule of law at <http://www.unep.org/ourplanet/imgversn/153/annan.html> (Last visited Nov 2009).

international customary law, then it is quietly imported.¹¹³ For this work, the culpability of a head of state will be discussed using two conceptions. The first is what Justice Robert Jackson, Chief Prosecutor of the Nuremberg Trial, described in his opening statement as the “paradox of diminishing legal responsibility,” and the second is the notion of immunity.

2.4.1 The Paradox of Diminishing Criminal Legal Responsibility

Justice Robert Jackson stated at the Nuremberg that “We [...] should not accept the paradox that legal responsibility should be the least where power is the greatest.”¹¹⁴ According to the learned prosecutor, “[w]e [should] stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still ‘under God and the law.’” The diminishing responsibility the prosecutor argues against had been a common feature of the English feudal law, which was framed according to the idea that the “King can do no wrong”¹¹⁵ and that the King is the law giver and thus cannot submit to the law he makes.¹¹⁶ Such notions prevailed through out the medieval period and trickled down through the seventeenth and eighteenth centuries, even though writers such as Bracton in the thirteenth century had opposed the view and urged that “[...] the king [ought to] render to the law what the law has rendered to the king, viz dominion and power,”¹¹⁷ The belief that the “king can do no wrong” placed the king, his officials, and his apparatuses above the reach of the law.

¹¹³ It is unresolved because of the conflict it poses to other customary norms such as *jus cogen* norms.

¹¹⁴ Christopher Keith Hall, “Universal Jurisdiction The challenges for Police and Prosecuting Authorities” International Justice Project, at the Second International Expert Meeting on War Crimes, Genocide and Crimes against Humanity, 16 June 2005, Interpol, Lyon. Amnesty International AI index 1or 53/007/2007.

¹¹⁵ Gamal Moursi Badr “State Immunity an Analytical and Prognostic View” pg 41

¹¹⁶ *Id.*, Gamal Moursi Badr

¹¹⁷ De Legibus Et. Consuetudinibus Angliae: The Laws and Customs of England; George D. Lodbire, ed. London, 1915-1942 cited by Justice Kanyiehamba surpa.

Yet by commanding the greatest amount of power and resources, the King was capable of doing serious damage.

It took at least four centuries for the opposing views to be gain recognition. Thus, until Nuremberg, attempts to try heads of state either ended extra judicially, as in many cases of coup d'etat,¹¹⁸ or in military tribunals, where the standards of full and fair trials were hardly observed. After the Nuremberg trials, as discussed in Chapter 2.1, a consistent trend emerged that heads of states and other high-ranking governmental officials should not be allowed to take shelter behind official positions if they were responsible for crimes.

Proponents of this trend particularly sought to restrict immunity in instances of abuse of office, corruption, and gross human rights violations committed while in office.¹¹⁹ From the Standpoint of the Nuremberg Charter and Judgment, immunity came to be viewed neither as a defence nor as the justification for a reduction of sentence. On this point Jackson stated:

Nor should such a defence be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded.¹²⁰

The above positions, as discussed in Chapter 2.2, were codified by the International Law Commission in what became the Principles of the Nuremberg Charter. These principles laid the foundation for a consistent rejection of the rules about immunity. This conclusion can be drawn from a survey of the instruments that were subsequently developed.¹²¹ This progress went hand-in-hand with scholarly opinion that supported the rejection of immunity. The most regularly cited

¹¹⁸ William Doyle the Oxford History of the French Revolution. (2002). Pages 194-196 Deals with the execution of King Louis XVI Oxford University.

¹¹⁹ See Prosecuting Heads of State, Edited by Ellen L. Lutz , Caitlin Reiger (London:, Cambridge University Press, 2009)

¹²⁰ William Doyle loc. cit., fn 125 pages194-196

¹²¹ Article 6 of the Charter of the International Military Tribunal for the Far East (1946) provided that the official position of the accused was not "sufficient to free such accused from responsibility for any crime with which he is charged".

opinion is that of Sir Arthur Watts, which was also cited by the House of Lords in the Pinochet case.¹²² Sir Watts observed that “The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law”¹²³ Watts concluded that “[i]t 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.”¹²⁴ Thus the question is no longer whether heads of state can be tried but the question rather is how and when.

2.4.2 The Obstacles of Personal and Functional immunities

Despite the normative progresses discussed above, the prospects of prosecuting heads of state for grave human rights abuse or international crimes remain severely stifled by doctrinal rules of international law immunities.¹²⁵ As stated earlier, it the opinion of the ICJ that; “the various international conventions on [...] punishment of certain serious crimes imposing on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, [...]in no way affects immunities under customary international law.”¹²⁶ The ICJ has

¹²² Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division) Pinochet's case can be found at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino2.htm> (Last visited on Oct 29, 2009).

¹²³ See Arthur Watts The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers page 82

¹²⁴ Id., pg 84

¹²⁵ H. Fox, *The Law of State immunity* (New York: Oxford University Press, 2002), p. 13. See Heidi Altman “The Future of Head of State Immunity: The Case against Ariel Sharon”, (April 2002) pg 5 found at <http://www.indictsharon.net/heidialtman-apr02.pdf> (Last visited Oct 29 2009).

¹²⁶ *DRC v. Belgium*, the Case Concerning the Arrest Warrant of April 11 para 59.

gone on to state that “[...] even where those courts exercise such a jurisdiction under these conventions.”¹²⁷

In relations to heads of state, International law recognizes two types of immunities. The first is, *personal immunity* (immunity by reason of the person) also termed, immunity *rationae personae* and, the second is *functional immunity*, termed *rationae materiae* (immunity by reason of the subject). The distinction in these two immunities as succinctly put by Craig Forcese is that whereas immunity *rationae personae* protects “an individual personifying/representing [the] state from being impleaded in a foreign court”, immunity *rationae materiae* allows the state to “extend the cloak of its own immunity” to all officials including lower ranking officials sued for conducting states affairs.¹²⁸ Thus the first category of immunity (immunity *ratione personae*), comes with the duty of personifying or representing the state on the international plane¹²⁹ but the second category is a general immunity accruing to all state officials irrespective of ranks. Immunity *rationae personae* was the subject of the controversial decision in the *DRC v. Belgium* case.¹³⁰ The judgment in the above case, noted that the protection granted by immunity *ratione personae* to the person of the head of state, and other high ranking officials is absolute and covers both private and public acts (including past crimes) so long as he/she remains in office.¹³¹ The court went to state that “[o]nce the [official] is divested of that office and becomes [...] ex-head of state, he may be sued like any ex-ambassador for all the personal acts performed during

¹²⁷ *Id.*,

¹²⁸ Craig Forcese “De-immunizing Torture: Reconciling Human Rights and State Immunity” *McGill Law Journal* 52 (2007): 130

¹²⁹ Dapo Akande, “International Law Immunities and the International Criminal Court” *American Journal for International Law* 98, no. 3, (2004): 407-407. He states at page 407 that “This law proceeds from notions of sovereign equality and is aimed at ensuring that states do not unduly interfere with other states and their agents.”

¹³⁰ *DRC v. Belgium ICJ Arrest Warrant Case*, also see Forcese loc.cit., fn 142.

¹³¹ Year book of the International Law Commission, 1985, Vol 2, part 1 (New York, UN, 1987) at 44.(UN Doc. A/CN.4/388)

his office that were unconnected with the official functions[...]"¹³² The same reasoning was alluded to during the trial of General Pinochet.¹³³ In Pinochet's case Lord Nicholls remarked that: "There can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity."¹³⁴ The problem with immunity *rationae personae* is that the protection is the 'blind type;' covering all acts by the official's including those that the official's home country laws treat as illegal.¹³⁵

The persistent argument for the retention of the grant of absolute immunity *ratione personae* even in relation to human rights violations and international crimes is that the domestic regimes are competent to investigate, try and punish high ranking state officials and hence there is no need for foreign courts to interfere in the internal affairs of other states. The other claim is that personal immunity, immunity *rationae personae* is temporary in nature – thus the official could be tried when he/she leaves the post. The assumption is that there are no life presidencies. But the Ghaddafi and Mugabes of Africa have been in power for three decades.¹³⁶ Anyhow, since the next chapter (Chapter 3) offers a detail discussion of many of the justifications for the grant of immunities, and criticisms I preserve further discussion for Chapter 3.

¹³² *Id.*,

¹³³ *R v Bow St. Magistrate, Ex Parte Pinochet Ugarte*, para 930 in the speech of Lord Millet, in the third *Pinochet* case echoing a similar view noted that – "[...]Senator Pinochet is not a serving head of state. If he were, he could not be extradited *R v Bow St. Magistrate, Ex Parte Pinochet Ugarte*

¹³⁴ *R v Bow St. Magistrate, Ex Parte Pinochet Ugarte*, 1998 4 ALL ER (Pinochet 1), at 938.

¹³⁵ The Arrest Warrant case, *DRC Congo v. Belgium*.

¹³⁶ See Ghadafi of Libya since, (31 years), Robert Mugabe of Zimbabwe (30 years), Yoweri Museveni, (23 years) Paul Biya of Cameroon, (26 years), Lansana Conte of Guinea 24 years, the list is long.

CHAPTER 3: IMMUNITIES OF HEADS OF STATE: CHANGING PERCEPTION

3.1 A Typological Overview of the Doctrine; a Post-Modernist Enquiry

As earlier raised in the introductory part of this work, very little research has paid attention to the study of the use and misuse of key terminologies and concepts that have long muddled the doctrine of immunity. According to Fox, this misuse is attributable to the long absence of a multilateral treaty on immunity.¹³⁷ The recent report of the ILC on the “Immunity of State Officials from Foreign Criminal Jurisdiction” also raised a similar concern.¹³⁸ According to the report, both the concept of “immunity” and that of “state official,” although widely used in practice (including in judicial rulings to date), still have not acquired universally agreed on definitions.¹³⁹ Because of the lack of a common definition the focus of the field has been scattered and fragmented. For U.S jurists, immunity has been a matter of “a privilege granted by the forum state to foreign state [...] as a gesture of comity.”¹⁴⁰ In contrast, in the jurisprudence of the United Kingdom, the European Court of Human Rights, and the International Court of Justice (ICJ), immunity is regarded *not* as merely a gesture of comity *but* a legal right and a rule of customary international law.¹⁴¹

The above variances have also characterized the meanings various scholars have accorded to different terms and concepts. The first such term is “sovereign immunity.” Jurgen

¹³⁷ Hazel Fox *The Law of State Immunity* (2008) 2nd Edn Oxford University Press pg 2

¹³⁸ International Law Commission, Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc A/CN.4/601 by Special Rapporteur Roman Anatolevich Kolodkin, ILC 60th session Geneva, 5 May-6 June and 7 July-8 August 2008.

¹³⁹ *Id.*,

¹⁴⁰ See *Republic of Austria v. Altmann*, US Supreme Court, 327 F 3d 1246 (2004), Also see *Clinton v. Jones* (1997) and *United States v. Noriega* (1990).

¹⁴¹ See the Decision on the Arrest Warrant Case cited earlier.

Brohmer, citing Stein, defined “sovereign immunity” to mean “the right of a state and its organs not to be held responsible for their acts by the (judicial) organs of other states.”¹⁴² However, Badr writing back in 1984 defined “sovereign immunity” as the immunity that accrues not to the state but to the ruler of a state¹⁴³; in other words, what Antonio Cassese defines as “official immunity.”¹⁴⁴ Another opinion is that of Peter Malanczuk, who sees “sovereign immunity” as meaning “state immunity.”¹⁴⁵ The vague word here is “sovereign,” a word associated by Vattel to mean the “topmost position.”¹⁴⁶ In Jackson Maogoto words “to be sovereign is to be subject to no higher power.”¹⁴⁷ In the medieval era, the sovereign in no doubt was the monarch and by inference the ruler. However, in recent years, the usage of the term (“sovereign”) has been uncommon perhaps because of its vague and archaic contextual meaning. Besides, the word “sovereign” is not used in present-day international instruments. It is thus not surprising that the 2004 Convention on Jurisdictional Immunity of States and their Property¹⁴⁸ does not employ the term even though in its definition paragraphs of Article 1, it defined the word “state” as including state “representatives.”¹⁴⁹ Yet, the Convention hardly dealt with the immunities that accrue to state officials *rationae personae*.¹⁵⁰ The title alone, suggests that the intended scope of the Convention was to cover the jurisdictional immunity of states and their property, and in its

¹⁴² See Jurgen Brohmer, “State Immunity and the Violation of Human Rights” (Berlin: Martinus Nijhoff, 1997)pp. 3, cites Stein in : LdR/VR, pp 132.

¹⁴³ See Gamal Moursi Badr, *State Immunity, An Analytical and Prognostic View* (Berlin: Martinus Nijhoff Publishers, 1984) pp.1

¹⁴⁴ Antonio Cassese, *International criminal law*, 2nd ed. (Oxford; New York: Oxford University Press, 2008): 302

¹⁴⁵ Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* 7edn. cited earlier pages 188-189

¹⁴⁶ *Id.*,

¹⁴⁷ Jackson N. Maogoto *The Final Balance Sheet? The International Criminal Court’s Challenges and Concessions to the Westphalian Model* bepress Legal Series Year 2006 Paper 1402, page 2.

¹⁴⁸ See United Nations Convention on Jurisdictional Immunities of States and Their Property. Adopted by the General Assembly of the United Nations on 2 December 2004. Entered into force in 2006. See General Assembly resolution 59/38, annex, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49).

¹⁴⁹ Article 2 (1), (b), (iv) “ State means (iv) representatives of the State acting in that capacity;”

¹⁵⁰ For Further discussion on the Convention see David P. Stewart, “The UN Convention on Jurisdictional Immunities of States and Their Property” *The American Journal of International Law*, Vol. 99, No. 1 (Jan., 2005) 194-211.

own terms, this is “without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.”¹⁵¹ In addition, the ILC is currently preparing a separate draft, titled the Convention on Immunity of Officials from Foreign Criminal Jurisdiction.¹⁵² This instrument will be of little legal use if the word “state” is conflated with “state officials.” The practice of this conflation is extremely troublesome and thus should be reconsidered. As stated by the U.S. District Court Judge Victor Marrero in the 2001 case of *Tachiona v. Mugabe* “since 1967, [...] some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation’s ruler is a distinct entity.”¹⁵³ The correct usage thus would be to treat ‘sovereign immunity’ as not meaning ‘official immunity’, but rather ‘state immunity’. “Official immunity” is the correct term for immunity that accrues to the ruler and by extension state diplomats. State immunity on the other hand refers to immunity that accrues to the state as a man-made entity.

The second problematic term is “immunity” itself. The term, which also lacks a universally accepted definition,¹⁵⁴ first appeared (in a universally accepted document) in the United Nations Draft Declaration of the Rights and Duties of States of 1949.¹⁵⁵ The declaration omitted a definition to “immunity,” but recognized its existence in international law and provided an understanding of the instances when “immunity” may arise. Article 2 thus provided that “[e]very State has the right to exercise jurisdiction over its territory and over all persons and

¹⁵¹ See Article 3 (2.) states that “The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.”

¹⁵² *Supra*

¹⁵³ See *Tachiona v. Mugabe*, 2001 US Dist. LEXIS 18712, 33-34 (US S.D. NY 2001).

¹⁵⁴ See The ICL Preliminary Report *supra* note 128

¹⁵⁵ See Declaration of the Rights and Duties of States of 1949, in Yearbook of the International Law Commission, 1949. Also see Bowett, D.W. *Self-Defence in International Law*. New York: Praeger, [1958]. Page 43 Reprinted 2009 by The Lawbook Exchange, Ltd.

things therein, subject to the immunities recognized by international law.”¹⁵⁶ The language of Article 2 suggests that the term “immunity” should be understood as meaning “immunity” from the “jurisdiction of a state.” This “immunity,” according to the ICJ Arrest Warrant case, means “jurisdictional immunities.”¹⁵⁷ The joint opinion by Judges Higgins, Kooijmans, and Buergenthal specifically stated that “‘Immunity’ is the common shorthand phrase for ‘immunity from jurisdiction’.”¹⁵⁸

In the ILC report on “Jurisdictional Immunities of States and Their Property,” the special Rapporteur suggested that terms “immunity” and “jurisdictional immunities” could be defined as follows: Immunity means “the privilege of exemption from, or suspension of, or non amenability to, the exercise of jurisdiction by the competent authorities of a territorial State” ¹⁵⁹ ; and jurisdictional immunities means “immunities from the jurisdiction of the judicial or administrative authorities of a territorial State.”¹⁶⁰ This distinction is essential in that it may offer useful explanation of the reason why in the ICJ’s opinion immunity would not apply to “certain international courts having jurisdiction.”¹⁶¹ The logical view is that “such courts” are not exercising the coercive powers of another state; which if they were, the courts would be violating the principle of sovereign equality, which prohibits a state from adjudicating the conduct of another state. The above could also be the basis of the invocation by the Special Court for Sierra

¹⁵⁶ Article 2 of the Draft Declaration of the Rights and Duties of States of 1949. The ICJ stated that “jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.” See the *Arrest Warrant Case* note 61, paras 24-25.

¹⁵⁷ Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Decision of 14 February 2002 para 60 page General list No 21.

¹⁵⁸ See joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant case, pg ICJ Report 2002 page 64 para 3.

¹⁵⁹ Article 2, paragraph 1(Draft), the Second Report on the Jurisdictional Immunities of States and their Property.

¹⁶⁰ *Id.*,,

¹⁶¹ The ICJ stated that “..an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before “certain international criminal courts, where they have jurisdiction.”

Leone (SCSL) of its “international legal personality”¹⁶² in its denial of the immunity claims of President Charles Taylor of Liberia in the 2004 decision; even though amidst heavy scholarly disputes.¹⁶³

The other confusing issue is the classification of the recipients of international law immunities. International law does not provide an exhaustive list of office bearers that should be entitled to official immunities. Instead it relies of a descriptive approach, that is, persons acting on behalf of the state on the international plane.¹⁶⁴ This may be an endless list. Przetacznik states that, in the realm of international immunities;

An official of a foreign State is a person who either, under its law, is invested with legal authority to act as its official representative (a head of State, a Head of government, or a Minister of Foreign Affairs) and is authorized by the sending State to act in the capacity of its representative (a diplomatic agent or a diplomatic member of a special mission), or to act officially on its behalf (a consular officer, a diplomatic member of a permanent mission to an international organization, or a diplomatic member of a delegation to a international conference) in the receiving state.¹⁶⁵

The above statement limits the definition of state officials for the purpose of international immunities to those persons who represent the state in international relations and perform duties for the state. Przetacznik adds that “[t]he basic element of the notion is that ‘an official of foreign State’ [...] must either represent that State or officially act on its behalf or both.”¹⁶⁶ The above terms, however, do not eliminate the influx of persons who might want to be covered by international immunities because they occasionally represent or act on the behalf of a state in the international sphere. For example, Forcese cites a minister of finance as a good example of an

¹⁶² Prosecutor v. Charles Ghankay Taylor Decision on immunity from jurisdiction May 31 2004, in the Appeal Chambers of SCSL, Case No. SCSL-2003-01-01 AR72(E). Para 51, SCSL stated that the “principle of immunity derives from equality of sovereign states (one sovereign state does not adjudicate on the conduct of another state)

¹⁶³ M. Frulli, “The Question of Charles Taylor’s Immunity: Still in Search of a Balanced Application of Personal Immunities,” *JICJ* no.2 (2004)1118,1126.

¹⁶⁴ D. Akande, “International law Immunities and the International Criminal Court”*AJIL*, no. 98 (2004):407, 409

¹⁶⁵ Franciszek Przetacznik “Basic principles of international law concerning the protection of the officials of foreign states”, paper delivered at the thirty-first annual convention of the International Study Association in Washington, D.C., on 11 April 1990, p. 52.

¹⁶⁶ *Id.*,, p.52

office bearer, who sometimes signs financial documents that are binding on the state, and/or sometimes represents the state in another way, yet does not have a clear entitlement to immunity.¹⁶⁷ Forcese adds that “[w]hether these officials are also accorded immunity *ratione personae* appears unsettled in customary law.”¹⁶⁸ However, the attempts to streamline this through case law have also not been consistent. In two separate cases in 2004 the Bow Street Magistrate’s Court in the United Kingdom, held that Israel’s Defence Minister and the Minister for Commerce and International Trade of China on a special mission were entitled to immunity and that arrest warrants could not be issued for them.¹⁶⁹ In the same year, the Italian Court of Cassation attempted to narrow its classification. It held in its Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic that the immunity granted under customary international law to serving heads of state, heads of government, and ministers of foreign affairs “did not extend and could not be applied by analogy to individuals who held such offices within entities that did not have the status of a sovereign state.”¹⁷⁰ A similar argument was made in the dissent by Judge Van den Wyngaert in the Arrest Warrant case.¹⁷¹

Recently, in regard to Djibouti’s claim that France infringed the immunities of the procureur de la République and the Head of National Security of Djibouti, the ICJ noted that there were no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities since neither were they diplomats within the

¹⁶⁷ Forcese, page 137

¹⁶⁸ *Id.*, page 137. Also see Fox who argues “It remains to be seen whether other ministers, by reason of representing and committing their States in respect of major international obligations, will also be recognized as enjoying such a privileged status” at 423

¹⁶⁹ *Re General Shaul Mofaz*, Judgment of 12 February 2004, reproduced in ICLQ, Vol. 53, 2004, pp. 771-773; United Kingdom, District Court (Bow Street), *Re Bo Xilai*, Judgment of 8 November 2005, ILR Vol 128, pp. 713-715. In the latter case the fact that the Minister was a member of a special mission was given high consideration.)

¹⁷⁰ Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic, No. 49666, Judgment of 28 December 2004. Italy, Court of Cassation (Third Criminal Section), The entities meant here are states within federation. This case concerned the immunities of the President of Montenegro.

¹⁷¹ DRC v. Belgium Arrest Warrant Case dissent of Van den Wyngaert (ICJ *ad hoc* Judge) cited earlier.

meaning of the Vienna Convention on Diplomatic Relations of 1961, nor were they covered by the Convention on Special Missions of 1969. It further observed that at no stage were the French courts “informed by the Government of Djibouti that the acts complained of by France were its own acts” and that the two officials “were its organs, agencies or instrumentalities in carrying them out.”¹⁷²

The concrete reality is that the extension of the protection of immunity does not have a clear-cut scope. Immunity may be extended to any official who is appointed to represent or act on the behalf of a state on the international plane. In any case, a nation’s criteria for appointment to such offices are not subject to international scrutiny.¹⁷³ Therefore, the correction of some of these inherent conceptual problems is important in streamlining the law of immunities.

3.2 Doctrinal History and Theories of Officials Immunities

Before the 19th century, three theories the popularity of which have varied over time, underpinned the notion of official immunities; these were the “theory of extraterritoriality”, the theory of “sovereign representation” or (theory of representative character) and “the theory of functional necessity.”¹⁷⁴ However, by the mid 20th century, there came a consistent rejection of the oldest of the three the theories mainly for its ‘fictitious extra-territorial’ assumptions (viewing the diplomatic premise of in the host country as an extension of the territory of the

¹⁷² *Djibouti v. France* at page 5 available on <http://www.icj-cij.org/docket/files/136/14570.pdf>.

¹⁷³ A university professor known for his or her integrity is just as good for immunity if he becomes a minister of foreign affairs, just as a brutal rebel leader known for his or her disregard of international law may be appointed to the position.

¹⁷⁴ See Peter Malanczuk, *Akehurst’s Modern Introduction to International Law Book* (1997) pg 450 450 pgs Routledge publishers. Also see Franciszek Przetacznik “Basic principles of international law concerning the protection of the officials of foreign states”, paper delivered at the thirty-first annual convention of the International Study Association in Washington, D.C., on 11 April 1990, p. 52.

sending state.)¹⁷⁵ Thus, during the drafting of the Preamble to the Vienna Convention on Diplomatic Relations,¹⁷⁶ “extraterritoriality theory” was omitted and Diplomatic Immunity was premised on the remaining two theories. The forth preambular paragraph stated, that the rationale for the “[...]privileges and immunities is not to benefit individuals but to ensure the *efficient performance of the functions* of diplomatic missions *as representing States*.”¹⁷⁷ The reference to “effective performance of their functions” attested to the “theory of functional necessity” and “on behalf of their respective state” pointed at the “representative character” theory. Similarly the ICJ has observed in respect to Ministers of Foreign Affairs¹⁷⁸ that “[i]n customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the “effective performance of their functions” “on behalf of their respective States.”¹⁷⁹ More recently, the ILC Special Rapporteur on “Immunity of State Officials from Foreign Criminal Jurisdiction,”¹⁸⁰ also makes mention of “functional necessity” theory and “representative character” theory as being the only two theories underlying the grant of immunity to state officials in contemporary international law.¹⁸¹ As for the theory of extraterritoriality, the Rapporteur specifically stated extraterritoriality theory “has long ceased to exist and be used”¹⁸² and did not hold ahead any further consideration of the theory. Nonetheless, a brief discussion of each of the theories and their critiques is useful.

¹⁷⁵Javid Gadirov, “Mapping International Justice: Immunity of State Officials and Individual Criminal Responsibility” a Doctoral Thesis submitted to the Central European University 2007. CEU library. <http://www.library.ceu.hu/> (Last visited Oct 29 2009).

¹⁷⁶ Vienna Convention on Diplomatic Relations of 18 April 1961

¹⁷⁷ *Id.*, para 4 of the preamble.

¹⁷⁸ *DRC v. Belgium*, the Arrest warrant Case p. 22, para. 53.

¹⁷⁹ *Id.*, p. 22, para 53.

¹⁸⁰ The Special Rapporteur Preliminary Report on Immunity of State officials from Foreign Criminal Jurisdiction,; UN Doc A/CN.4/601 International Law Commission, by Special Rapporteur Roman Anatolevich Kolodkin ILC 60th session Geneva, 5 May-6 June and 7 July-8 August 2008.

¹⁸¹ *Id.*, page 40

¹⁸² *Id.*, page 41. The Rapporteur noted that “the theory of extraterritoriality has long ceased to exist and be used.” It made no review of it, an indication that the theory is no longer noteworthy.

First is the “**theory of extraterritoriality**” which some scholars regard as perhaps the oldest of the three theories.¹⁸³ It is based on the notion that the diplomatic premises and thereby its occupants (state representatives), although physically in the soil of the receiving state should be deemed as not in the receiving state’s territory but rather that of sending state.¹⁸⁴ The theory regarded missions in host countries as an extension of the territory of the sending state. Early proponents such as Hugo Grotius, (also regarded as the father of international law) maintained the theory’s most sweeping narratives. In Grotius’ views, writes Keith Hamilton, resident ambassadors were to be deemed as outside the territory in which they resided. Further, that Grotius was advising those seeking recovery of debts from resident Ambassadors to “behave as if the debtor (ambassador) was abroad.”¹⁸⁵ It is nearly impossible to logically connect an ‘absentee’ or a ‘ghost’ ambassador to debts he/she is capable of borrowing yet incapable of repaying due to a plea *alibi* as it is to explain the belief that suggest a person physically in a country as not in that country when their daily dealings and damages thereto occur within. Undoubtedly, the theory gave rise to many thorny questions in regards to the exercise of jurisdiction. Hersch Lauterpacht asked which state would have jurisdiction in case a burglar broke into the embassy premises.¹⁸⁶ For extraterritorialists, it would likely be the sending state. For sovereignists, this approach definitely does not sit comfortable with the notion of exclusive sovereignty, as it does purport not only to claim portion of the soil of another sovereign state, but also jurisdiction over foreign territories. According to Lauterpacht, “extraterritoriality theory in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but

¹⁸³ *Id.*,,

¹⁸⁴ See Keith Hamilton, Richard Langhorne “The practice of diplomacy: its evolution, theory, and administration” (Routledge publishers, 1995) 44, Reprinted 2000, also *See* Gamal Moursi Badr, *State Immunity, An Analytical and Prognostic View* (Berlin: Martinus Nijhoff Publishers, 1984) 1- 10.

¹⁸⁵ *see* Keith Hamilton, *supra* note 153, pg 44. In which it is cited that Grotius was advising those seeking recovery of debts from the Ambassador to “behave as if the debtor was abroad.”

¹⁸⁶ *See* H. Lauterpacht *International Law Reports* (1942)pg 269 Also *see* Lassa Oppenheim, *International Law: A Treatise*, volume 1, 792 (Lauterpacht, 8th ed, 1955).

within the territories of the receiving state”¹⁸⁷ Badr opines that extraterritoriality was only a metaphor that should not be taken literally.¹⁸⁸ Consequently, the theory was also called “the fiction of extraterritoriality.”¹⁸⁹

Thus, in 1953, in the case of *Tietz et al. v. People’s Republic of Bulgaria*, the theory of extraterritoriality was rejected as “an older doctrine of international law which has not found any modern-day acceptance” and an “artificial legal fiction which does not appear to be accepted as sound law anywhere in the world today.”¹⁹⁰ The British Courts followed suit in 1973 in *Radwan v. Radwan*¹⁹¹ to reject this theory during a hearing which sought clarification as to whether the premises of the Consulate General were within or outside the British Isles for the purpose of recognition of the Talaq divorce conducted in the consulate’s premises of the United Arab Republic in London. Lastly in the United States, the Court of Appeal in *McKell v. Islamic Republic of Iran* held that the “United States embassy remains the territory of the receiving state, and does not constitute territory of the United States” and that “United States embassies are not within the territorial jurisdiction of the United States.”¹⁹²

Thus in drafting the preamble of the Vienna Convention, the ILC also declined to justify immunity of diplomats on the theory of extraterritoriality. Javid Gadirov wrote that Sir Fitzmaurice noted that the “theory of extraterritoriality would not bear close examination”¹⁹³; so

¹⁸⁷ See H. Lauterpacht *International Law Reports* (1942)pg 269 Also see Lassa Oppenheim, *International Law: A Treatise*, volume 1, 792 (Lauterpacht, 8th ed, 1955).

¹⁸⁸ Badr *Supra* note 154

¹⁸⁹ *Id.*, pg 269.

¹⁹⁰ *Tietz ET AL v. People Republic of Bulgaria*, 28 ILR 369 at 379, Supreme Restitution Court for Berlin established by Allies,

¹⁹¹ *Radwan v. Radwan* (1), (1973)*Fam. 24*; [1972]3 *W.L.R* 735; [1972] 3 *All E.R* 967.

¹⁹² *McKeel v. Islamic Republic of Iran*, (1983) *US Court of Appeal Ninth Circuit* 722 F.2d 582 .The Courts stated that “Informed as we must be by that practice the issue before us is whether the embassy in Tehran is "territory ... subject to the jurisdiction of the United States." Appellants contend that it is. ... A United States embassy, however, remains the territory of the receiving state, and does not constitute territory of the United States.”

¹⁹³Javid Gadirov, “Mapping International Justice: Immunity of State Officials and Individual Criminal Responsibility” a Doctoral Thesis submitted to the Central European University, 2007. See CEU library. <http://www.library.ceu.hu/> (Last visited Oct 29 2009)

did the Anatolevich Kolodkin, (ILC Special Rapporteur), during the May 2008 report on immunity of State officials from foreign criminal jurisdiction.¹⁹⁴ The former probably marks the end of its relevance in legal discourses.

The second theory, the “**theory of sovereign representation,**” or representative character propounds the view that immunities to state representatives stem from the notion of personification,¹⁹⁵ and that of, sovereign equality among states.¹⁹⁶ In the words of Simbeye, the immunities to state representatives are granted because “the envoy [official representative] represents [or personifies] an equal sovereign.”¹⁹⁷ Thus as equals, sovereign states generally are deemed to lack the competence to adjudicate the conduct of other sovereign states, unless consent is granted. This is encapsulated in the maxim, “*par in parem non habet iurisdictionem*” in which it is maintained, that the exercise of a coercive act by one state over the representatives of another state infringes *indirectly* the “sovereignty equality of states” and thereby the immunity that the *represented* state should enjoy from the jurisdiction of other states in international law.¹⁹⁸ Forcese and Akande have argued separately that the essence of the theory is to forbid states’ interference judicially or otherwise in the affairs of another state and in so doing ensuring respect to the territorial integrity and sovereignty of independent states.¹⁹⁹ Convincingly as it may, the theory is nonetheless without flaws. No wonder it has not stood alone but had to be supported by functional necessity considerations.

First, while this theory could justify the lawful public acts of a state representative taken on behalf of the state, it offers no theoretical explanation or justification for the protection of

¹⁹⁴ Cited earlier UN Doc A/CN.4/601 page 41.

¹⁹⁵ The notion that state representatives personifies the state.

¹⁹⁶ See e.g. *Schreiber v. Canada*, 2002 SCC 62, [2002] 3 S.C.R. at para 13, 216 D.L.R. (4th) 513, in which the supreme court observed that “An equal [sovereign] has no authority over an equal in public international law”. Also See *Schooner Exchange v. Mc Faddon* cited earlier”.

¹⁹⁷ See Yitiha Simbeye Immunity and International Criminal Law Yitiha Simbeye pg 95

¹⁹⁸ *Id.,,*

¹⁹⁹ See supra Craige Forcese – De-immunizing Torture, page 133, Akande, loc. cit., fn 1 pg 407

unlawful private acts taken by the representative in his/her private capacity, both before, or during his/her term of office. Second, it also offers no explanation why illegalities and ultravires acts should enjoy immunity, if such acts are forbidden under the domestic law of the state. Third, the theory purports to place state representatives at the same level as the state hence placing him/her above jurisdiction, save where there is a waiver. Because of this very gap, war criminals have often ‘held the state hostage’ and used it as a shield from prosecution, without the state having other recourse.

The third theory is “**functional necessity**”. According to this theory, the basis of immunities to representatives of a state lies in the plain fact that they are necessary to enable the official to perform state functions. As earlier discussed, both the Diplomatic and Consular Privileges and Immunities were premised upon their functional needs as much as the representative character theory. The preamble of the Vienna Convention on Diplomatic Relations 1961²⁰⁰ provides that “[r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to *ensure the efficient performance of the functions of diplomatic missions as representing States*,”²⁰¹ so did the Vienna Convention on Consular Relations.²⁰² Similarly, in the Arrest warrant judgment, the ICJ stated with respect to a Minister of Foreign Affairs, that immunity protects “official against any act of authority of another state which would hinder him or her in the performance of his or function [...]”²⁰³ Just as with the representative character theory, defects to the functional necessity theory are also numerous. First, it is unclear why a state’s function should be so strongly attached to one or two individuals, (more over who are short-termed political appointees) so much that their incarceration for grave crimes must

²⁰⁰ Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, Treaty Series, vol. 500, p. 95.

²⁰¹ Id., pg 95

²⁰² The Vienna Convention on Consular Relations contain an almost identical language as the Diplomatic Convention, see the 5th Preambular Para at <http://untreaty.un.org/ilc/texts> (Last visited Nov 2009)

²⁰³ Supra, DRC v. Belgium cited earlier para 54

paralyze the entire state in which millions of other competent individuals capable of performing the same state tasks exist. The strict application of functional necessity theory also does not explain why impeachment could suffice to remove high ranking officials from office, without cause to worry about irreparable disruption to state function and yet the same if done on account of grave accusations before foreign states is taken as having so devastating a effect on a state function as to have it forbidden. This as with the other theories, do not explain states persistent refusal and or failure to remove, prosecute and replace leaders accused of serious crimes. For this reason, the theories are increasingly being viewed as ‘suspect political devise’ to cloth political leaders from accountability.

So much are the criticisms that the entire doctrine of immunity seems at the brink of loosing all the three traditional theoretical rationales for sounder ones. In 2007, at the discussion at the Sixth Committee of the General Assembly on new topics to be included in the long-term programme of the ILC, the United Nations General Assembly cautioned that while the ILC works on Official Immunities from Foreign Criminal Jurisdiction, “due priority should be given to the need for State officials to enjoy such immunity, for the sake of stable relations among States.”²⁰⁴ This reference to “stable relations among States” does not sound typical of “functional necessity” theory, or of any of the three theories discussed earlier. It may in fact, likely be an emerging theory or a re-embodiment of the notion of international comity, especially given, the diminishing relevance of sovereignty in the post-modern era.²⁰⁵ Professor Louis Henkin once wrote that it was “time to bring sovereignty down to earth.”²⁰⁶ That time has probably come, compelling a newer and sounder rationale for clothing state representatives. On the other note,

²⁰⁴ (A/CN.4/577, para. 126) <http://untreaty.un.org/ilc/sessions/59/59docs.htm> (Last visited Oct 29 2009).

²⁰⁵ “Time to bring Sovereignty down to earth” as Prof. Louis Henkin of Columbia Law School, is quoted to have said has probable come. Thus compelling newer and sounder reasons for clothing state leadership from prosecution. This may be evidence of the transgression. <http://www.benferencz.org/index.php?id=4&article=51>. (Visit Oct 2009)

²⁰⁶ Benjamin B. Freencz International Law As We Enter the 21 Century <http://www.benferencz.org/index.php?id=4&article=51> (Last visited Oct 29, 2009)

international comity has been a common premise for immunity in American and some European jurisdictions but the ICL has rejected its legal efficacy²⁰⁷ since the notion by contrast regard immunity as merely signs of good gesture, friendliness and reciprocity and nor a right.²⁰⁸

3.3 The Evolving International Jurisprudential Trends

Like any aspect of international law, the rule on official immunities has not been static. At its inception, earlier decisions such as the widely cited 1821 US case of *The Schooner Exchange v. M’Fadden and others*²⁰⁹ took the standpoint of absolute immunity.²¹⁰ The notion of absolute immunity meant total and unqualified immunity to state and its senior officials from the jurisdiction of other States. However, as the former took increasing role in commerce, gradually the neutral rules of trade demanded a line drawn between those activities that were immune and those from which state officials acting as merchants would not enjoy immunity.²¹¹ In Vattel’s words “if a sovereign descend[ed] from the throne and became a merchant, [he/she thus was presumed to have] submitted to the law of the country.”²¹² Thus from the work of municipal courts, there came the adoption of statutes qualifying official immunity in commercial

²⁰⁷ Before the ECHR, in *Al –Adsani v. The United Kingdom* 2001, it was observed that “ the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states through the respect of one other’s sovereignty. Supra E.C.H.R [2001] XI, 79, 34, E.C.H.R. 273 [*Al- Adsani v. United Kingdom*]

²⁰⁸ See *Controller & Auditor General v. Davison*, [1996]2 N.Z.L.R. 278.

²⁰⁹ *The Schooner Exchange v. M’Fadden and others* 11 U.S. 116 (1812). 302 The plaintiff were denied a hearing for the recovery of their ship seized on high seas by the France.

²¹⁰ The case concerns the forceful capture by units of France navy of a private boat called “The Schooner Exchange” belonging to a US citizen M’Fadden and Partners. The name of boat was turned into a France War Vessel “Balou”. Several years later it stopped on its way for repair in Philadelphia apparently under stress of weather and the rightful owners M’Fadden sought to reclaim title and they were unsuccessful on ground of immunities.

²¹¹ Gamal Moursi Badr “State Immunity” An Analytical And Prognostic View (Berlin: Martinus Nijhoff Publishers 1983) p.14. See Badr citing Vattel.pg 11

²¹² Id.,

transactions—thus the birth of the restrictive approach. This marked the first roll-back on the notion of immunity.

In the human rights and international criminal law arena, the rise of international criminal tribunals and principally their effort to bring to trial officials who otherwise were immune from jurisdiction have been the major drivers of the movement towards qualified immunity in cases that involve international crimes and gross human rights abuse. Nothing can better illustrate the evolution than the three prominent decisions handed down in the last one decade.

3.3.1 From the Arrest Warrant (Yerodia), to Charles Taylor, to Al Bashir.

In the wake of February 2002, the ICJ had its first opportunity to deal with official immunity in a case that concerned the Arrest Warrant of 11 April 2000²¹³ issued by a Belgium investigating Judge for the arrest of then Congo's (DRC) Foreign Minister, Mr. Abdulaye Yerodia, for inter alia war crimes and crimes against humanity allegedly committed before becoming Minister of Foreign Affairs.²¹⁴ In finding the measure by Belgian Court in violation of international law immunities,²¹⁵ the Court narrowed on the function of the Minister of Foreign Affairs,—equating the that function to that of a Head of State—to hold that:

[...] a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the

²¹³ Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2002] I.C.J. Rep. 3 I.L.M. 536 [Congo v. Belgium cited to I.C.J. Rep.]. <http://www.icj-cij.org/docket/files> (Oct 2009)

²¹⁴ The DRC (the Congo) instituted proceedings against Belgium in respect of a dispute concerning an “international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia. Contending that Belgium is violating the “principle that a State may not exercise its authority on the territory of another State”, the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State.

²¹⁵ Para 46 “...assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo”

Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.²¹⁶

And that, “th[ese] functions [...] are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.”²¹⁷

Relying on the aforesaid functions and the representative character of a Minister of Foreign Affairs, the Court was not persuaded by the argument that the rule of immunity in cases of grave crimes had changed.²¹⁸ In this regard, it stated that it was unable to find anywhere in state practice or opinion juris a suggestion that war crimes or crimes against humanity overrode immunities accorded to state officials under international law.²¹⁹ The ICJ also declined to accept Belgium’s argument that there was a distinction to make between acts committed before or during time spent in office.²²⁰ Thus concluded by finding Belgium in violation of Mr. Yerodia’s official immunity, “[...]assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000[...],”²²¹ In regard to the warrant already circulated, by ten votes to six, the court directed that “[...]the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.”²²²

The ICJ nonetheless emphasized that its conclusion was not a suggestion that Mr. Yerodia enjoyed impunity for the alleged crimes.²²³ It went on to list four scenarios in which Mr.

²¹⁶ DRC Congo v. Belgium Para 53

²¹⁷ Id., Para 53

²¹⁸ *The Arrest Warrant Case*, , para 51, the ICJ stated that the notion of official immunity and the inviolability of its bearers had a firm establishment in international.

²¹⁹ Id., Para 57

²²⁰ Id., para 55 states “[N]o distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.”

²²¹ Id., para 55

²²² Id., para 76 *Arrest Warrant case* The ICJ went on to state “The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs.

²²³ Id., *Arrest Warrant Case* paras 57 -62

Yerodia could be tried, including, a trial before “certain international courts with jurisdiction,”²²⁴ specifically mentioning the ICTY, ICTR and the ICC. For a detail discussion see Chapter 3.3.1.

Two years later, relying in part on the *obita dictum* referred above, on 31 May 2004, the Special Court of Sierra Leone’s (SCSL), unanimously denied the cloak of immunity to Liberian ex-president Charles Taylor Ghankay even though his criminal proceedings before the SCSL was commenced while he was still head of state.²²⁵ The SCSL categorized itself among the ‘certain international courts with jurisdiction’²²⁶ to which in the light of the ICJ Arrest Warrant decision, immunity should not apply.²²⁷ Premising official immunity squarely on the doctrine of *par in parem non habet iurisdictionem*,²²⁸ the SCSL contended that it was not exercising the coercive powers of another state as for its Warrant of Arrest and judicial action to tantamount to the exercise of judicial authority of another state over Liberia.²²⁹ It went on reiterate that had it held otherwise (upheld Taylor’s immunity claim), it would have nonetheless proceeded to re-issue a fresh warrant since Taylor at the time of the decision had ceased to hold office.²³⁰

A Judgment consistent with that of the SCSL was followed by the ICC Pre-Trial Chamber I when issuing an Arrest Warrant for president Bashir on the 4 March 2009.²³¹ The Pre-

²²⁴ *Id.*,

²²⁵ *Prosecutor v. Charles Ghankay Taylor* Case No. SCSL-2002-01-1 Decision on Immunity From Jurisdiction, 31 May 2004.

²²⁶ *Id.*, see Para 42 “We come to the conclusion that the Special Court [SCSL] is an international criminal court”

²²⁷ This however, has been very controversial, given the treaty based nature of the SCSL to which Liberia as a state was not a party. Sarah William and Lena Sherif in “The Arrest Warrant for President al-Bashir: Immunities of incumbent Heads of State and the International Criminal Court,” *Journal of Conflict and Security Law* 14 (2009)71-92 disagree with the parallel drawn by the ICJ between ICC, ICTY and the ICTR when mentioning those “certain international court having jurisdiction.”

²²⁸ Meaning “no state may exercise jurisdiction over other states without its consent” Also see Steffen Wirth *Immunities, Related Problems, And Article 98 of the Rome Statute*, (Criminal law Forum, 2002)430

²²⁹ *Prosecutor v. Charles Ghankay Taylor* para., 42.

²³⁰ *Id.*, Note 179

²³¹ Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009 <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (Last visited Oct 27 2009).

Trial Chamber held that in its opinion “the current position of Omar Al Bashir as head of a state [of a country] which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.”²³² It went on to state that one of the core goals of the Statute is to put an end to impunity and observed that Article 27, which expressly derogates immunity²³³ was included in the Statute in order to achieve this core goal. In the view of the Pre-Trial Chamber, the referral of the situation in the Darfur to the ICC, pursuant to article 13(b), by the Security Council of the United Nations meant that the Council had also accepted that the investigation into the said situation, as well as any prosecution arising there from, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.²³⁴ In essence, implying that the UN Security council had accepted that all prosecutions pursuant to the referral, (regardless that Sudan is not a party), would be conducted in accordance with the Rome Statute—to which Article 27 would apply to Al Bashir.

The Pre-Trial Chamber however made no mention of the application of Article 98 and the exemption which the Rome statute accords to nationals of non state parties. It also did not delve in the treaty principle that forbids the imposition of treaty regimes on non-consenting states.²³⁵ This as we shall see in Chapter IV became an issue of heated debate with some commentators calling it a ‘negligent dereliction’ on the part of the Court.²³⁶ However, in my view, I would consider that the silence meant that the Pre-Chamber did not find Article 98 applicable in the circumstance; I will argue this in Chapter 4.3.1

²³² *Id.*, para 41

²³³ See Article 27 (1) provides that “(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

²³⁴ *Id.*, ICC AL Bashir Arrest warrant Decision para 45

²³⁵ This rule was codified in the Convention on the Law of Treaties of 1969, which states that treaties do not “create either obligations or rights for a third State without its consent.”

²³⁶ Dapo Akande, “Is Sudanese President Bashir Immune from Arrest?” EJIL Analysis July 11 2009. Available at <http://www.ejiltalk.org/is-sudanese-president-bashir-immune-from-arrest/> (Last visited Oct, 2009).

Although the ICJ Arrest Warrant decision was widely criticized,²³⁷ the two cases that followed, (that is, the SCSL Taylor and ICC Omar Al Bashir,) both renewed testament that progress has not been hindered on the part of international criminal courts or tribunals. The drawback, however, lies with universal jurisdiction and the execution of international arrest warrants by states. All in all these three cases, reveal a steady accumulation of international jurisprudence paving way for international tribunals to exercise judicial role without the inferences of immunity—much as are still left with the aforementioned dilemma.

3.3.2 Does Immunity not Equal Impunity? Evaluating ICJ's Arrest Warrant 4 Prong Exceptions.

For many commentators, the upholding of immunity for Abdoulaye Yerodia, a suspected war criminal was a major setback in the fight against impunity. According to the ICJ however, its finding was not a suggestion that state officials “enjoys impunity in respect of crimes they [...] commit.”²³⁸ In the court’s view, the immunity the court sought to uphold was only a temporary procedural bar²³⁹ that did not absolve the officials of their crimes and that, thus, should not be equated with impunity.²⁴⁰ It went on to present four situations/cases to argue its position.

The first is that such state officials are not under international law immune from criminal prosecution in their own countries, and, therefore, they could be tried in their home countries.²⁴¹ The second is that the represented state of nationality of the accused official could waive the

²³⁷ See Jan Wouters “The Judgement of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks,” *Leiden Journal of International Law* 16 no. 2 (2003) 253-267

²³⁸ The Arrest Warrant Case para 60 and 61

²³⁹ Id., para 67 the ICJ stated that “Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.”

²⁴⁰ *Arrest Warrant Case* para 60. The court noted that “immunity from jurisdiction ... does not mean that [state officials] enjoy impunity in respect of the crimes they might have committed.”

²⁴¹ Id., Para 61 “First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.”

immunity of the official so that a trial could proceed.²⁴² The third is that, if an official ceases to hold office, he or she would also no longer be entitled to international immunity.²⁴³ In the last situation, an incumbent official could be tried before ‘certain international courts’ that have jurisdiction and, in this regard, the ICC, the ICTY, and the ICTR were mentioned.²⁴⁴

However, the ICJ’s majority’s opinion did not explain what they understand by the term “impunity”, even though an argument was made against equating immunity with impunity.²⁴⁵ Perhaps this was a key error as the court denied itself the base to closely examine both the meaning of impunity and the claim that immunity results in impunity. In this case, beyond the argument that immunity is only procedural and does not absolve perpetrators of criminal responsibility, the court’s understanding of impunity has to be construed in the context of the four scenarios outlined above. However, within the court, itself there were already doubts about the feasibility of the redress options presented by the court. On the latter, the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal concurred with the majority’s conclusion, but noted that “[they][felt] less than sanguine about examples given by the Court of such circumstances.”²⁴⁶ To these judges, the probability that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State “is not high as long as there has been no change of power.”²⁴⁷ With regard to the possibility of trial before “certain international courts,” the Joint

²⁴² Id., para 61 “Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.”

²⁴³ Id., Para 61 Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States.

²⁴⁴ Id.,

²⁴⁵ Id., Para 60 and 61

²⁴⁶ Id., Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal para 78 These agreed with the courts conclusion and on its decision on admissibility but departed on the question of ordering Belgium to cancel the outstanding arrest warrant, see para .

²⁴⁷ Id.,

Opinion was of the view that such an occurrence is ‘rare’ and that it is “also risky to expect too much from future international criminal courts in this respect.”

Justice Van den Wyngaert (ICJ ad hoc Judge), who wrote vehemently in dissent from the majority’s opinion, said that “[i]n theory, the Court may [have been] right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated,”²⁴⁸ but that “[i]n practice, [...] immunity leads to *de facto* impunity.”²⁴⁹ To Judge Van den Wyngaert, “[...]the core of the problem of impunity, [is that] national authorities that are not willing or able to investigate or prosecute crimes domestically, will leave the crimes to go unpunished.”²⁵⁰ She holds this as precisely what happened in the case of Mr. Yerodia.²⁵¹ Judge Wyngaert’s understanding of impunity is not very different from other mainstream views. Impunity in the human rights context, has defined by Derechos as “the lack of accountability for human rights violations committed, or condoned, by agents of the state.”²⁵² Derechos adds that impunity “[...]can be either *de jure* or *de facto*, legitimized by amnesty laws or enshrined by corrupted or incompetent judicial systems.”²⁵³ Likewise, Principle 1 of the United Nations’ Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity views impunity resulting from “[the] failure by States to meet their obligations to investigate violations; [and to] take appropriate measures in respect of the perpetrators, particularly in the area of justice...”²⁵⁴

²⁴⁸ Dissenting opinion of Judge ad hoc Van den Wyngaert, page 160

²⁴⁹ *Id.*,

²⁵⁰ *Id.*,

²⁵¹ *Id.*,

²⁵² Derechos Human Rights, “What is Impunity?” Available at Without Impunity, June 1998 V.I No.1 <http://www.derechos.org/wi/1/1.html>

²⁵³ *Id.*, supra note 202

²⁵⁴ Economic and Social Council, ‘Promotion and Protection of Human Rights: Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher: Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity’, E/CN.4/2005/102/Add.1 (2005).

These views both place emphasis on effective judicial redress. Thus, a determination of whether immunity does equal impunity necessitates the examination of whether, under the regime of immunity, violations committed by high-ranking state officials are effectively redressed. Effective redress in these cases imply a speedy, adequate and timely judicial remedy not dependent on political determinations.²⁵⁵ The need for redress is consistent with the positive duty contained in international human rights normative framework to effectively investigate, prosecute, and punish the alleged violations.²⁵⁶ If immunity must bars investigation, abuses by officials cannot be brought to light. In addition, if the victims have to wait until the official relinquishes office, for some heads of state, the choice to vacate office or not is dependent on their individual free will as opposed to the electorate. For example, Sudan's president, Omar Al Bashir, who has been in power for over two decades, was recently re-elected for another five-year term.²⁵⁷ At the same time, he is wanted by the ICC for genocide and other graves crimes. If he wins two more consecutive terms, victims of the Darfur atrocities will have to wait for 15 more years for any kind of redress. In the criminal context, the maxim *justice delayed is justice denied* very much applies. Whether the rules of immunity are procedural or not, in this case and other cases, the rules cannot be said to be a '*handmaidens of justice*'; to the contrary they 'defeats justice.'²⁵⁸ I therefore find it difficult to agree with the ICJ argument on all fronts.

Secondly, to suggest that such officials do not enjoy international immunity in their own countries and hence could stand trial therein ignores the problematic practicality of such a happening. In the *Arrest Warrant case* itself, proponents of this possibility need to explain why

²⁵⁵ Id, see the definition of effective remedy, page 5.

²⁵⁶ See Communication No. 821/1998, *Chongwe v. Zambia* adopted on 25 October 2000, in *GAOR*, A/56/40 (vol. II), p. 143, para. 7

²⁵⁷ President Al Bashir came to power through a Military Coup 21 years ago and has been in power since then and so has Robert Mugabe of Zimbabwe and President Yoweri Museveni of Uganda. For details on Sudan's 2010 election see <http://www.nytimes.com/2010/04/27/world/africa/27sudan.html> (last visited June 2010).

²⁵⁸ See the dictum of B.Odoki, CJ in Presidential Election Petition No. 1/2001 pg 10 para 3 that. "Rules of procedure should be used as handmaidens of justice but not to defeat it."

the Congo did not in the first place use its domestic laws to try Mr. Yerodia, since international immunity *does not* cover him domestically. The ICJ suggestion also fails to acknowledge that some states have in place national immunity laws that bar the prosecution of top officials even before their own the domestic courts.²⁵⁹ In Pakistan, this prohibition of suits against the president includes a bar against the continuation of legal proceedings that commenced before the president took office.²⁶⁰ With such a provision, war criminals could seize state power simply to defeat criminal proceedings.²⁶¹ In addition, many states have put in place amnesty laws, and embraced other measures that place political considerations ahead of justice.²⁶² Admittedly, the reluctance of states to prosecute their murderous, powerful military and political leaders is the reason for the establishment of universal jurisdiction in the first place.²⁶³ Thus, to remit the prosecution of such officials to the country where they enjoy overwhelming power and control is, in essence, to leave redress for victims in the hands of their abusers. In such scenarios, the assumption that those leaders would adjudicate their shortcomings and condemn themselves to imprisonment or other penalties defies logic. In any case, the reason why redress is sought abroad is often not that victims want this kind of resolution, but instead that domestic courts have refused or have shown unwillingness or inability to provide adequate redress domestically. The Yerodia case is a clear example. The Democratic Republic of the Congo refused and/or neglected to employ its criminal law regime to ensure that Yerodia stood trial for crimes he is alleged to have committed long before he became a government minister. Instead, the suspect was elevated to a position that granted him international immunity. When redress was sought abroad, the country where he

²⁵⁹ See, Pakistan, In Pakistan, the Constitution, in Articles 248(2) and (3) bars any initiation or continuation of any criminal proceedings against the president during his term in office. This just does not only protection the president while in office, but also his/her personal acts from before.

²⁶⁰ Id., Article 248 of the Pakistan Constitution 1993. Also see Section 308 of the Constitution of Nigeria, 1999.

²⁶¹ For statistics and other detailed analysis see “Prosecuting Heads of State” (2009) Edited by Ellen L. Lutz , Caitlin Reiger, Cambridge University Press.

²⁶² Id.,,

²⁶³ Victims seek redress abroad often not because they like it but rather because nationally they cannot get one.

wielded political power did not waive his immunity, but instead stood in the way of justice by suing those who offered to fill the impunity gaps existing in its internal legal regime. This case clearly supports Browne-Wilkinson's notion that there are regimes that will not adjudicate their own wrongs.²⁶⁴ The other example is the situation in Sudan. When Sudanese Minister of Internal Affairs, Mr. Ahmad Harun, was indicted by the ICC for, *inter alia*, grave breaches of international humanitarian law,²⁶⁵ Sudan responded by promoting the indicted minister to the post of Minister in Charge of Humanitarian Affairs.²⁶⁶

The third suggestion made by the ICJ was in relation to the state's waiver of immunity. In most cases, any such waiver has resulted not from consistent state practices but from fortune. The first kind of fortune occurs when there is a regime change, perhaps through some "unfortunate" invasion, as was the case with Iraq²⁶⁷ or Panama. Furthermore, the experiences in past cases indicate that the regime change has to be not merely a change of the guard, but instead a fundamental change that brings in new leaders who are unsympathetic to brutality of the former regime.²⁶⁸ In the case of Liberia, even when there was what a "fundamental regime change seemed" Charles Taylor still got the Liberian state to rally for the retention of his immunity.²⁶⁹ In fact, Liberia filed a separate pleading before the Special Court of Sierra Leone with regard to Taylor's immunity.²⁷⁰ There was a similar occurrence in Pinochet trial

²⁶⁴ Regina v. Ex parte Pinochet Supra Lord Brown-Wilkinson

²⁶⁵ ICC Situation and Cases at [http://www.icc-cpi.int/menus/icc/situations and cases/](http://www.icc-cpi.int/menus/icc/situations+and+cases/) (Last visited Oct 2009)

²⁶⁶ ROBERT CRYER "Sudan, Resolution 1593, and International Criminal Justice" Leiden Journal of International Law, 19 (2006),

²⁶⁷ David M. Ackerman, "International Law and the Pre-emptive Use of Force Against Iraq, , American Law Division updated April 2003, also *see* Prosecuting Heads of State 2009 *supra*.

²⁶⁸ For example, the deposed Romanian president Nicolae Ceausescu and his wife Elena were tried and sentenced to death by a firing squad in 1998 after a secret military tribunal found them both guilty of crimes against the state [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/25](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/25/Oct 2009) (Oct 2009).

²⁶⁹ See the Special Court of Sierra Leone Decision on Taylor's Immunity, cited earlier.

²⁷⁰ See Case No SCSL-2003-1-AR72 decision of May 31 2004. Pg 6-7

proceedings even though Pinochet was no longer a head of state.²⁷¹ A waiver may also be frustrated by the non cooperation of third states.²⁷² This non cooperation happened in the cases of Mengistu Haile Mariam of Ethiopia, Hussein Habre of Chad, and, to some extent, Slobodan Milosevic of Yugoslavia. In the case of Mengistu, Ethiopia waived his immunity, sentenced him to death, and, subsequently, to life imprisonment in absentia because the government of Zimbabwe would not hand him over for trial.²⁷³ The immunity of Hissène Habré of Chad was also waived, and, like Mengistu, he was tried and sentenced to death in absentia. His location in Senegal is well known, but efforts to apprehend him so that he may stand trial have been going forward for nearly two decades, since 1990.²⁷⁴ His host, Senegal, has not only delayed Habré's trial but in fact has turned the trial into a money-making enterprise.²⁷⁵ In 2009, Human Rights Watch reported that Senegal was then conditioning Habré's trial on a payment from donors of 27 million Euros. The alternative would be that Habré would be allowed to walk out of Senegal a free man.²⁷⁶

The ICJ's fourth scenario is the trial of a head of state before "certain international courts" that have jurisdiction but no police force. The first flaw in this suggestion is that if immunity is interpreted as blocking sovereign states from the arrest and surrender of high-ranking officials of other states to those "certain international courts," which have jurisdiction but no police force, the no trial would take place. Secondly, the challenges involved in taking

²⁷¹ See Pinochet Trial cited earlier.

²⁷² Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal

²⁷³ See Amnesty International Report 2009 available at <http://thereport.amnesty.org/en/regions/africa/ethiopia> (Last visited Nov 20 2009)

²⁷⁴ See "We Don't Want to Die Before Hissene Habre is Brought to Trail" CHAD: Voices of Habre's Victims, Appeal Cases Amnesty International AI index: AFR 20/009/2006 August 2006.

²⁷⁵ R. Brody, 'The Prosecution of Hissene Habré: International Accountability, National Impunity', in Roht-Ariaza and Mariezcurrena, eds., supra n. 13, p. 278 at p. 296.

²⁷⁶ See <http://www.hrw.org/en/news/2009/02/20/belgium-asks-world-court-act-former-chad-dictator> According Human Rights Watch "Senegalese President Abdoulaye Wade has threatened to allow Habré to leave Senegal if international donors do not provide €27 million in trial costs to Senegal." (Last visited Nov 2009)

custody of an incumbent cannot be overemphasized. Radovan Karadzic (the self-styled president of the Republika Serbska) was indicted by the ICTY, one of those “certain international courts” mentioned by the ICJ. Karadzic nevertheless successfully evaded trial for 12 years, until mid-2008.²⁷⁷ Interestingly, even after his arrest, he still went on to raise claims related to international law immunities.²⁷⁸ Slobodan Milosevic of the former Yugoslavia was arrested after two years of pursuit, but died without the pronouncement of a final judgment.²⁷⁹ The Special Court of Sierra Leone’s Warrant of Arrest, which was transmitted to Ghana for the arrest of Charles Taylor, was returned unexecuted.²⁸⁰ A final example is the ICC’s attempt to take custody of Omar Al Bashir. These and other experiences show that there are unreasonably long waits for those “certain international courts,” which lack effective arrest mechanisms needed to detain indictees. Because of the *realpolitik* that is often at play, by the time the “long hand of the law” finally reaches them, they are too old, too sick, or too weak to stand trial. Hence in the cases of Pinochet and Milosevic, illnesses effectively frustrated their trials and prevented them from serving their sentences. In these two cases, the victims not only waited, but also did not get to see the attainment of justice.

In general, Immunity presents a major structural obstacle not only to the prevention of atrocities, since it bars investigations, but also to the punishment of gross human rights violations since it bars prosecutions. It is not immediately clear what “certain international courts” that have jurisdiction but not police forces will do when indicted heads of state will not voluntarily surrender to stand trial and when states continue their lack of cooperation. Immunity thus

²⁷⁷ See The Guardian, at <http://www.guardian.co.uk/world/2008/jul/22/warcrimes.internationalcrime> (Last visited Nov 2009)

²⁷⁸ *Id.*,.

²⁷⁹ See Milosevic Found Dead in His Cell, BBC news, Saturday 11, March 2006 available at <http://news.bbc.co.uk/2/hi/europe/4796470.stm> (Last visited Nov 15, 2009)

²⁸⁰ See Case No SCSL-2003-1-AR72 decision of May 31 2004.

provides very valuable aid to impunity. In this regard, the ICJ's theoretical dichotomy regarding procedural and substantive aspect of criminal justice cannot be considered tenable. On the contrary, as one scholar rightly acknowledged, "the framing of immunity as a procedural rule...deflects acknowledgment and examination of the impunity which often results by granting immunity to a foreign state."²⁸¹

²⁸¹ Lorna McGregor "Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty" *The European Journal of International Law* Vol. 18 no.5 EJIL (2008): 903–919 McGregor argues that the framing of immunity as a procedural rule, in itself is used to deflect acknowledgment and examination of the impunity which often results by granting immunity to a foreign state.

CHAPTER 4: THE POTENTIAL WITHIN THE ROME STATUTE SYSTEM

4.1 Understanding the Rome Statute's Two Pillar System

The Rome Statute of the International Criminal Court (hereinafter “the Rome Statute” or “ICC Statute”)²⁸² was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) on 17 July 1998.²⁸³ However, since its adoption, commentators have raised doubt of the statute’s implementation feature. Yet the statute stands as a major tool in the security of human rights on the global scale. This chapter attempts, among other things, to shed light on the statute’s implementation features and the statute’s systemic structure.

The Judge president of the International Criminal Court Phillippe Kirsch,²⁸⁴ in his 2007 address to the United Nations General Assembly, described the Rome Statute as establishing a “two pillar system”²⁸⁵; ‘a judicial pillar represented by the Court, and an enforcement pillar represented by the states²⁸⁶ and by extension international organizations.’²⁸⁷ This systemic

²⁸² The Rome Statute of the International Criminal Court was adopted 17 July, 1998 by 120 States and Entered into Force on 1st July 2002, as of October 3, 2009, 110 states have ratified the Statute, a copy can be found on <http://www.icc-cpi.int> (last visited Oct 3, 2009.)

²⁸³ As corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002.

²⁸⁴ Judge Phillippe Kirsch was first President of the International Criminal Court and Judge 2003-2009. See <http://www.un.org/News/Press/docs/2009/sgsm12094.doc.htm>

²⁸⁵ These statements are contained in the Third Annual Report of the International Criminal Court to the United Nations General Assembly of 1 Nov 2007. The report is can be found at [http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/\(LastvisitedOct14,2009\)](http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/(LastvisitedOct14,2009)). Many scholars and legal practitioners adopted this definition. See Address by Ms Patricia O’Brien, Legal Adviser to the Department of Foreign Affairs, Ireland during the International Society for the Reform of Criminal Law Dublin, 12, July 08 at <http://www.isrcl.org/Papers/2008/OBrien.pdf>.

²⁸⁶ These refer to states that are party to the Rome Statute but also include those that enter into temporary agreements with the ICC for the purpose of effecting its arrest warrants. Although still unresolved, I strongly think that those states that come under court’s jurisdiction by way of UN Security Council Referrals also are included. See Article 13 (b) of the statute.

²⁸⁷ In fact ICC-UN entered into an agreement pursuant to Article 2 of the Rome Statute and entered into force on the 4 Oct 2004. Doc ICC-CPI-20041001-77 at <http://www.icc-cpi.int> (accessed Oct 2009)

framework is often not emphasised in legal scholarship, yet it importantly explains how, for example, a judicial organ inherently deprived of enforcement powers is expected to function. It would be difficult to interpret or to apply the text of the Rome Statute without perceiving it as a system, as this would not only leave out the interdependency of the statute's judicial organs but also would add very little to an understanding of the statute's core systems, and of the degree of co-operation structured in the judicial organ. Importantly, viewing the statute as a system should clarify that the pillars (the court and the state parties), when acting under the Rome Statute, are governed by the same law.

The third aspect of the ICC statute is the complementarity principle. This principle is based on the strong reminder that the crimes for which the ICC has jurisdiction are not new; neither is the requirement that they must be punished. Some of these crimes are the oldest of international crimes. For example, genocide was the first crime to be enlisted under the auspices of the United Nations in the adoption of the Genocide Convention in 1948.²⁸⁸ War Crimes and Crimes against Humanity have constituted the grave breaches under the Geneva Convention since its adoption in 1949.²⁸⁹ For each of these crimes, a universal jurisdiction was long conferred²⁹⁰, requiring all states to prosecute wherever these crimes are committed, an obligation states have been reluctant to carry out²⁹¹ (though nearly 125 states have put in place legislation permitting their courts to do so).²⁹² Thus, the international obligation to domestically prosecute

²⁸⁸ See Genocide Convention adopted on 9 Dec 1948, entered into force on 12 Jan 1951, it declared genocide an international crime, whether committed in time of war or peace, removed the defence of immunity and any limitation with respect to time and place. See <http://www.un.org/millennium/law/iv-1.htm>

Also see Antonio Cassese, *International Criminal Law*, 2 Edn (2008) pg 31 Oxford University Press.

²⁸⁹ See *Supra* Geneva Conventions 1949 and the Additional Protocol I and II of 1977

²⁹⁰ According to a study by Amnesty International, "approximately 125 countries have legislation permitting their courts to exercise universal jurisdiction over conduct amounting to a crime under international law."

<http://asiapacific.amnesty.org/library/Index/ENGIOR530072007?open&of=ENG-385> (Last visited Oct 2009)

²⁹¹ See Antonio Cassese, *International Criminal Law*, 2 Edn (2008) pg 31 Oxford University Press.

²⁹² *Supra*, Amnesty Study.

some of the crimes has existed prior to the adoption of the Rome Statute in 1998.²⁹³ In fact, if states were prosecuting these crimes as required under the various conventions,²⁹⁴ and also were not themselves (and their leaderships) accomplices in these crimes so as to prevent their prosecution domestically, there would have not been a need for an ICC. With this in mind of its framers, the ICC has therefore been specifically tasked with closing the existing impunity gap, by ensuring that perpetrators of the most serious crimes of concern do not go unpunished.²⁹⁵ In this regard, the ICC is mandated to investigate and or prosecutor wherever nationally there is an unwillingness or inability to prosecute.²⁹⁶ To ensure that the above duty is given full effect, the Rome Statute permits the ICC to investigate and prosecute situations occurring in territories of non-state parties where there is an agreement to that effect. In this a state need not be party to the ICC. It may enter an agreement with respect to a particular situation. One such example is the Côte d'Ivoire declaration accepting ICC investigation in its territory even though it was not party to the Rome Statute.²⁹⁷ Secondly, the UN Security Council has been permitted to remit cases to the ICC pursuant to its Chapter VII powers, whenever it deems fit. In so doing, it ensures that international law is not flouted by unwilling or unable or un-cooperating states.²⁹⁸

²⁹³ See Article IV of the Genocide Convention states that, "[p]ersons committing genocide[...]shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." See Article VI.

²⁹⁴ *Supra*.

²⁹⁵ See Paragraph IV of the Preamble of the ICC "affirms that that the most serious crimes of concern to the international community as a whole must not go unpunished...."

²⁹⁶ See Article 17 (1) (a) of the Rome Statute on inadmissibility and Para 10 of the Preamble.

²⁹⁷ The Republic of Côte d'Ivoire has accepted the exercise of jurisdiction by the International Criminal Court with respect to crimes committed on its territory since the events of 19 September 2002. The declaration was sent in accordance with Article 12, paragraph 3 of the Rome Statute. See Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, at www.icc-cpt.int/press.

²⁹⁸ See Paragraph X of the Statute cited earlier. The parties "resolved to guarantee lasting respect for and the enforcement of international justice."

4.1.1 Historical Reasons and Purpose of the Rome Statute

The first five preambular paragraphs of the Rome Statute of the International Criminal Court (ICC)²⁹⁹ draws upon its history and some of the key reasons why the ICC came into existence. In its first preambular paragraph, the Statute is a response to “the existing threat to the ‘delicate mosaic’ of the human family”³⁰⁰ and the disturbing fact that in the past century “[...]millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”³⁰¹ Yet perpetrators of grave crimes are left unpunished.³⁰² Further the preambular noted concern about the growing culture of ‘impunity.’³⁰³ The preamble further states that Rome Statute therefore seeks to put an end to impunity for the perpetrators of three overlapping categories of crimes, (i) “grave crimes that threaten the peace, security and well-being of the world”³⁰⁴, (ii) “unimaginable atrocities that deeply shock the conscience of humanity and the most serious crimes of concern to the international community as a whole”³⁰⁵ and in so doing thus contribute to their prevention. The Statute is premised on the idea that effective prosecution is best ensured by taking measures at the national level through the principle of complementarity and by enhanced international cooperation³⁰⁶—which can be interpreted as providing the necessary assistance whenever needed.

²⁹⁹ See Supra The Rome Statute of the International Criminal Court available on http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf (last visited October 3, 2009.)

³⁰⁰ See first Paragraph, of the Preamble “[...]concerned that this delicate mosaic may be shattered at any time), available at <http://www.icc-cpi>

³⁰¹ See second Paragraph to, that begins with “Mindful that this century...”

³⁰² See Third Paragraph of the Statute on the affirmation “... that the most serious crimes of concern to the international community as a whole must not go unpunished...”

³⁰³ See fifth Paragraph in which the statute echoes its determination (“.. to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”

³⁰⁴ *Id.*,, preambular para 3.

³⁰⁵ *Id.*,,

³⁰⁶ See Rome Statute Preambular para 10

4.1.2 ICC Crimes, Jurisdiction and Rationale: An Overview

The crimes within the remit of the court as listed in Article 5 (1) are, “limited to the most serious crimes of concern to the international community as a whole.”³⁰⁷ These are genocide,³⁰⁸ crimes against humanity,³⁰⁹ war crimes,³¹⁰ and lastly crimes of aggression³¹¹ when a definition is adopted. As for jurisdiction, the ICC literally has an inactive *secondary jurisdiction* limited *ratione temporis* “only to crimes committed after the entry into force of the Statute.”³¹² This date is July 1 2002.³¹³ Even so, jurisdiction is exercised only upon activation by one of the court’s three “trigger mechanisms” laid out in Article 13 of the Statute.³¹⁴ These ‘triggers’ are State Party referral under Article 13 (a) in accordance with Article 14,³¹⁵ UN Security Council Chapter VII referral under Article 13(b),³¹⁶ and the Prosecutor’s *proprio motu* under Article 13 (c) in accordance with Article 15.³¹⁷ The rationales behind each of these triggers are as follows. As for UN Security Council Referral under Article 13 (b) commentators opine that it was to render the creation of further ad hoc tribunals like the ICTY and the ICTR unnecessary, since the ICC could be used to serve those purpose earlier served by the ICTY and the ICTR.³¹⁸ On the other hand, state party referrals under Article 13 (a)—was intended to ensure that states would be able to refer situations within the territories of other states parties much as it was not envisioned that

³⁰⁷ Article 5 (1)

³⁰⁸ See Article 6 for the constitutive elements of Genocide.

³⁰⁹ See Article 7 for the constitutive elements for Crimes Against Humanity

³¹⁰ See Article 8 for the constitutive elements of war crimes, it essentially incorporate the grave breaches of the Geneva conventions 1949

³¹¹ See Article 5 of the Rome Statute.

³¹² Article 11 (1) provides that “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”

³¹³ It entered into force on 1 July 2002 upon the 60th ratification.

³¹⁴ Article 13 of the Rome Statute of the International Criminal Court, 1998 cited earlier.

³¹⁵ Article 13 (a)

³¹⁶ Article 13 (b)

³¹⁷ Article 13 (c)

³¹⁸ See Foreword by Adriaan Bos, (2009) 13 (ed) *The Emerging Practice of The International Criminal Court*, Edited by Carsten Stahn and Goran Sluiter. Martinus Nijhoff Publishers States referring their own cases to the ICC.

there would be self-referrals as the case later turned out.³¹⁹ The Prosecutor's *proprio motu* under Article 13 (c) was to enable the prosecutor to initiate prosecution on its own, thereby safeguarding the Court's independence.³²⁰

In nutshell, not even with respect to ICC crimes is the ICC a court of first instance.³²¹ It is until states fail or refuse to prosecute crimes for which ICC has jurisdiction that the ICC shall get involved.³²² And even then, the focus of the ICC will only be on the '*most serious perpetrators*' thus leaving a potentially large number of perpetrators to be tried domestically.³²³ Essentially therefore, the primary responsibility of prosecuting ICC crimes is with national courts. According to Silvana Arbia, the Court's Registrar, such domestic prosecutions are essential in order to avoid "an impunity gap."³²⁴

4.1.3 Laws Applicable to the Court and Other actors

The second important aspect of the Rome Statute relates to its governing body of law. In Article 21, a hierarchical structure of applicable laws together with their orders of use is listed.³²⁵ In *Prosecutor v. Kony and others*, the Pre-Trial Chamber II in its decision of 28 October 2005 stated that:

Article 21, paragraph 1, of the Statute mandates the Court to apply its Statute, Elements of Crimes and Rules of Procedure and Evidence "in the first place" and only "in the second place"

³¹⁹ See Luis Moreno Ocampo "The International Criminal Court in Motion" in *The Emerging Practice of The International Criminal Court*, ed. Carsten Stahn and Goran Sluiter. (Berlin: Martinus Nijhoff Publishers, 2009) 13.

³²⁰ See Remarks by Silvana Arbia, ICC Registrar No Peace without Justice Roundtable on Implementing Legislation 17 July 2009 Rome, Italy. Available at http://www.icc-cpi.int/NR/rdonlyres/9EA855BC-A495-40AA-B5F8-92F44E08D695/280578/Statement_Registar2.pdf

³²¹ See Remarks by Silvana Arbia, cited earlier.

³²² See Article 17 of the Rome Statute; under which the duty to prosecute ICC crimes domestically is an admissibility requirement, unless that the state is either unwillingly or unable genuinely that is when ICC will treat a situation as admissible.

³²³ See Remarks by Silvana Arbia,

³²⁴ *Id.*, cited earlier above.

³²⁵ See Article 21 of the Rome Statute

and “where appropriate”, “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts”. Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such “applicable law”, before the Court beyond the scope of article 21 of the Statute.³²⁶

By contrast, a survey of Article 20 (3) of the Statute of the SCSL provides without a hierarchy that “the Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.”³²⁷

Gilbert Bitti, commenting on the uniqueness of Article 21, observes that Article 21 is exceptional in three ways: the first is its existence, the second is the specificity of its content and the third is the hierarchy it establishes.”³²⁸ Bitti notes that this provision does not exist in any of the international tribunals that have both proceeded and come after the ICC.³²⁹ The structure of Article 21 (1) (a), demands that the Court shall apply in the first place the Statute, and the Elements of Crimes and its Rules of Procedure and Evidence.³³⁰ Only ‘where appropriate’ and in the second place may the court then make recourse to 21 (1) (b), that is to “treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” And third, “Failing that, general principles of law derived by the Court from national laws of legal systems of the world including[...] provided those principles are not

³²⁶ See Pre-Trial Chamber II, Prosecutor v. Kony et al., Decision on the Prosecutor’s Position On the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, ICC-02/04-01/05-60, PTC II, 28 October 2005, para. 19.

³²⁷ The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and its Annex containing the Special Court Statute done at Freetown on 16 January 2002 are available at <http://www.sc-sl.org/documents.html>.

³²⁸ Gilbert Bitti opinion “The Treatment Of Sources Of Law In The Jurisprudence Of The ICC” In *The Emerging Practice of the International Criminal Court* eds Carsten Stahn and Göran Sluiter (Martinus Nijhoff:Berlin 2009) 281-304 also see at (Koninklijke Brill nv;The Netherlands , 2008) pp. 285-304.

³²⁹ Id., pp -285-304.

³³⁰ See Article 21 (1) (a) of the Rome Statute, referred rules, that is Rules of Procedure and Evidence, was adopted by the Assembly of States Parties to the Rome Statute, in accordance with article 51 of the Rome Statute, at its first session in New-York, 3-10 September 2002, Official Records, ICC-ASP/1/3 (Part II-A).

inconsistent with this Statute and with international law and internationally recognized norms and standards.”³³¹

In other words, Article 21 should be regarded as a complete statement on the sources of law and the order in which they shall be applied with respect to the ICC. The article, however, does not completely disregard the sources of international law as stipulated in Article 38 of the Vienna Convention on the Laws of Treaties. Rather what it means is that in all legal argumentations presented before the Court and in all decisions of the Court, the hierarchy established is the acceptable order on the sources of applicable law.³³² By extension I also think academicians, commentators, and indeed state parties (when acting under their mandate as enforcement pillars) should follow this hierarchy. Bitti seems to agree with this position, and he further observes that “even within the hierarchy there is a hierarchy, in which the Statute stands out as the supreme law” and hence “[...] prevails over the Rules of Procedure and Evidence in accordance with Article 51 (5), of the Rome Statute.”³³³

Lastly, the application of the second or third sources of law is subject to the existence of a gap in the Statute. The Appeal Chambers upheld this interpretation in the case of Prosecutor v. Thomas Lubanga Dyilo,³³⁴ in which it concluded contrary to the Prosecutors averment when he tried to argue that there was the gap, that

The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is inexistent³³⁵

³³¹ Article 21 (1) C

³³² Gilbert Bitti “The Treatment Of Sources Of Law In The Jurisprudence Of The ICC” In *The Emerging Practice of the International Criminal Court* eds Carsten Stahn and Göran Sluiter (Martinus Nijhoff:Berlin, 2009) 281-304

³³³ *Id.*, para 284

³³⁴ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 33-42.

³³⁵ Bitti, *loc. Cit.*, fn. 350, para 285

According to Bitti “a gap in the Statute” may be defined as An “objective” which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules of Procedure and Evidence, thus obliging the judge to resort to the second or third source of law—in that order—to give effect to that objective.³³⁶ What the above means is that the subsidiary sources of law described in Article 21 (1) (b) or (c) cannot be used just to add other procedural remedies to the Statute and the Rules of Procedure and Evidence.³³⁷

4.1.4 Supposed Conflict Between the Two Immunity Clauses (Article 27 and Article 98)

The concern of most commentators³³⁸ grappling with the legal construct of Article 27³³⁹ and Article 98³⁴⁰ relates to how, in such an important ground-breaking international legal instrument as the Statute of the ICC, there would exist a component which appears similar to a claw-back provision, whereby rights and obligations well suspended by one hand of the law is again restored by the other hand of the same law. Specifically, they wonder why Article 27 clauses (1) and (2) would expressly purport to render as “*irrelevant*”³⁴¹ any existing immunities claims based on official capacity with regard to prosecutions before the ICC, yet within the

³³⁶ *Id.*, para 286

³³⁷ See Lucas Buzzard “Holding an Arsonist’s Feet to the Fire? - The Legality and Enforceability of the ICC’s Arrest Warrant for Sudanese President Omar Al-Bashir” *American University International Law Review* 24, (2009): 897, also see Paola Gaeta “Does President Al Bashir Enjoy Immunity from Arrest?” *JICJ* 7 no. 2 (2009):315-332, also see Steffen Wirth “Immunities, Related Problems, and Article 98 of the Rome Statute” *Criminal Law Forum*, 12 (2001): 429-458, p. 456.

³³⁸ Article 27 (1) is on the “Irrelevance of official capacity” it provides that “This Statute shall apply equally to all persons without any distinction based on official capacity.” Article 27 (2) adds that “Immunities or special procedural rules which may attach to the official capacity...”

³³⁸ Article 98 governs “Cooperation with respect to waiver of immunity and consent to surrender”

³³⁹ Article 27 is titled “Irrelevance of official capacity.”

³⁴⁰ See Article 98 clause 2.

³⁴¹ Buzzard, and Gaeta loc., cit., fn 383

same Statute, Article 98 (1) suggests an intention to give effect to the rule of official immunities; first with respect to nationals of third States, and second, where there is a subsisting agreement to which the requested States has a duty under international law to adhere to.³⁴²

Critics contend that this seemingly contradictory mismatch in the provision of Article 98 creates a situation whereby ‘a request for arrest and surrender’ of an indictee national of a third state may never be issued—or, if it is issued, may not be given effect if waiver of immunity and consent to surrender by the concerned third State [non-state party] are not obtained. They argue that the blame lies with the drafting language of Article 98.³⁴³

One such critic, Lucas Buzzard,³⁴⁴ writing in 2009, questions whether the ICC, although tasked with ending impunity for the perpetrators of the most serious international crimes, has not been placed in an awkward position in which it is virtually prevented by Article 98 from requesting a state party to surrender those perpetrators if they are officials of another state and are entitled to immunity.

The above stance is not limited to Buzzard alone; in fact Professor Steffen Wirth, writing in 2001, echoes a similar view.³⁴⁵ He notes that, while waiver of immunity and consent for surrender are not needed when dealing with ICC state parties,³⁴⁶ the situation is different when it

³⁴⁴ Lucas Buzzard loc., cit., fn. 364., at 932. He states that “ A straight reading of the two articles creates a logical knot of Gordian proportions-the court tasked with ending impunity for the perpetrators of the most serious international crimes is prevented from requesting a state to surrender those perpetrators if they are officials of another state.”

³⁴⁵ STEFFEN WIRTH loc. cit., fn.1, also see Sarah Williams and Lena Sherif “The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court” *Journal of Conflict & Security* 14, no 1 (2009)71-92 Sarah Williams and Lena Sherif agree that “under Article 27 (2), states parties have agreed, by ratifying the Rome Statute, to waive their rights to procedural immunities under customary international law.”

³⁴⁶ In other words Article 98(1) is inapplicable because through State Party assent to the Statute they automatically waived all such immunities with respect to their nationals. See Sarah Williams and Lena Sherif loc. cit., fn 369

comes to non state parties.³⁴⁷ More recently, in a 2009 article, Professor Paola Gaeta argued along a similar line. Commenting on the ICC's issuance and circulation of arrest warrants for Sudan's incumbent president, Omar Al Bashir, Gaeta argues that "the request to States parties to surrender president Al Bashir is contrary to Article 98(1) of the Rome Statute and it is an act *ultra vires*" as it contravenes Al Bashir's immunity.³⁴⁸ On its probable legal effect, Gaeta opines that "States parties are therefore not bound to comply with this request."³⁴⁹

But one other scholar, Dapo Akande,³⁵⁰ takes the opposite view in an article that was published, interestingly, in the same journal and volume³⁵¹ in which Professor Gaeta takes the above position.

Akande is of the view that the two provisions (Article 27 and 98) are not inherently irreconcilable if one adopts "the principle of effectiveness in treaty interpretation."³⁵² According to this principle, a treaty interpreter "[...] must read all applicable provisions of a treaty in a way which gives meaning to all of them harmoniously and is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."³⁵³

Before exploring additional scholarly views on the debate, it is probably important to reproduce word for word the text of both Article 27 and Article 98, as this offers an idea to where each text is situated within the larger frame of the Statute—and also speaks to their

³⁴⁷ *Id.*, pg 456

³⁴⁸ Paola Gaeta loc.cit., fn 383 at 315

³⁴⁹ *Id.*, at 315.

³⁵⁰ Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" *Journal of International Criminal Justice* 7 (2009) 333-352

³⁵¹ See *The Journal of International Criminal Justice* 7 no.2 (2009) pages 135 and 357 respectively

³⁵² *Id.*, Akande loc., cit., fn. 371 at 338

³⁵³ *Id.*, Akande argues that reading Article 27 as applying only to actions by the Court would render parts of that provision practically meaningless. He correctly states that this is because the Court has no independent powers of arrest: It must rely on national authorities. Thus the removal of immunity must also be implied to actions taken on behalf of the ICC at the national level.

desired contextual reading and interpretation. Article 27 (1) is titled “*Irrelevance of official capacity*” and it stipulates as follows, that;

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, [...]shall in no case exempt a person from criminal responsibility under this Statute[...]³⁵⁴

Article 27 (2) addresses specifically the question of immunity, it states that;

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”³⁵⁵

As shown above, clause 1, of Article 27 is not an immunity clause but an *official capacity clause*,³⁵⁶ barring the selective application of the statute’s laws on account of the official capacity of an offender. The clause further declares that official position shall not serve as reason for exemption of the application of the statute or reduction of sentence under the statute. On the other hand, clause 2 of Article 27, expressly addresses the question of immunity. In other words, it creates an *immunity clause*, qualifying the provisions of clause 1, and barring specifically the application of “immunities and special rules of procedure” contained both in national and international law.³⁵⁷

Article 98 (1) on the contrary is titled “*Cooperation with respect to waiver of immunity and consent to surrender*” and is situated in the cooperation regime in Chapter IX. It stipulates that:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”³⁵⁸

³⁵⁴ Article 27 (1) addresses official capacity.

³⁵⁵ Article 27 (2) specifically addresses immunities.

³⁵⁶ Similar provisions are found in the IMT and the codified Principles, the ICTY, ICTR, SCSL and et al.

³⁵⁷ For further discussion *see* Sarah Williams and Lena Sherif loc. cit., fn. 369 page 77 para 3. They agree that “under Article 27 (2), states parties have agreed, by ratifying the Rome Statute, to waive their rights to procedural immunities under customary international law.”

³⁵⁸ Article 98 (1) addresses consent and waiver of immunity with respect nationals of non state party.

The above seems straight forward. The “court ‘*may*’ *not proceed* with a ‘*request for surrender or assistance*’” (note that this is not the same as the issue of an arrest warrant under article 58). The qualifier is, if the ‘*request for surrender or assistance*’ would require the requested state to ‘act inconsistently with the state’s obligation under international law with respect to the state’ or diplomatic immunity of a person or property of a *third State*³⁵⁹ unless the Court can first obtain the cooperation of that state for the waiver of the immunity. By virtue of the qualifier, the determination of the inconsistency of a ‘request with international law’ is an issue to be resolved before the court can be found in violation of the provision of Article 98. Lastly, that which has to be waived in the first place is immunity, before the Court can proceed with a ‘*request for surrender or assistance*’ which the court may through is cooperation regime of Article 87 (5) (a) obtain in a separate *ad hoc* agreement.³⁶⁰ This is a snapshot of the controversies surrounding the two provisions.

In a *prima facie* sense, Article 27 appears to be contradicted by Article 98. A number of commentators have had this impression on first reading. In fact, even Akande, who argues that the two Articles are reconcilable, admits that there is some tension.³⁶¹ However, interpretations of legal texts demand more than just a first-sight-type impression. Each text should not only be read with care to its drafters intent but also in a way that gives it effect and does not render any one of the provisions inoperative, as that would have never been the intention of its drafters; indeed, as Akande correctly points out, to give an absurd meaning to two or more texts would be contrary to the principle of effective treaty interpretation.³⁶² Notwithstanding the importance of

³⁵⁹ A third state by definition is any state that is not party to the Rome Statute.

³⁶⁰ See Article 87 (5), (a) provides that ; “The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.”

³⁶¹ See Dapo Akande, loc., cit., fn 371 at 337

³⁶² Id.,

the rule, the aforestated rule ought not to be understood as the starting point in interpreting treaties. In fact, most treaties contain clauses or at least a guide on how their provisions should be interpreted. With regard to the Rome Statute, the general principle of interpretation is set out in Article 21 (3). It provides that “interpretation of the laws applicable to the ICC shall be in the hierarchy stipulated in Article 21 and must be in a manner consistent with internationally recognized human rights.”³⁶³ While the latter has not yet gained a concrete framework, the former is a lot clear.³⁶⁴ The Pre-Trial Chamber I reiterated the above in *Prosecutor v. Germain Katanga*.³⁶⁵ It stated:

Considering that, as this Chamber has repeatedly stated, the Chamber, in determining the contours of the statutory framework provided for in the Statute, the Rules and Regulations, must, in addition to applying the general principle of interpretation set out in article 21 (3) of the Statute, look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties[...]³⁶⁶

In this regard, therefore, the proper interpretation of Article 27 and 98 must be guided first by the principle that the Rome Statute is the superior law in the hierarchy of laws applicable in matters of the ICC,³⁶⁷ and next by the general principles of interpretation as set out in Article 31 (1) of the Vienna Convention on the Laws of Treaties, which requires a treaty to be “interpreted in good faith in accordance with the ordinary meaning [given] to the terms of the treaty in their context and in light of its object and purpose”³⁶⁸

Bearing the above in mind, my interpretation of the two provisions would flow as follows: Article 27 read together (clause 1, and 2) purports to regard as “*irrelevant*” the official

³⁶³ Article 21 (3) of the Rome Statute

³⁶⁴ Gilbert Bitti loc. cit., fn 356. The general guide to a human rights approach to interpreting treaty provision is that the one which accords human rights a greater significance prevails.

³⁶⁵ *Prosecutor v. Germain Katanga*, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008, Pre-Trial Chamber I, ICC-01/04- 01/07-257.

³⁶⁶ Id.,.

³⁶⁷ Article 21 of the Rome Statute, also see ICC Decision on al Bashir’s Arrest Warrant, para 45, the PTC noted that the jurisprudence of the court has held that other sources of law referred to in Article 21 may only be referred to where there is a lacuna in the framework of the ICC and that the lacuna cannot be filled by ordinary rules of treaty interpretation, also see Sarah Williams and Lena Sherif loc. cit., fn 365, page 82 para 2.

³⁶⁸ Id.,loc.cit., fn 385 *Prosecutor v. Germain Katanga*

capacity, special procedures or immunities (under national and international law) of any accused persons brought under the operation of the Statute.³⁶⁹ In its March 2009 decision issuing a Warrant of Arrest for President Al Bashir, the ICC Pre-trial Chamber re-echoed this position,³⁷⁰ stating that Article 27 is “a core principle of the Rome Statute.” Suggesting, in other words, that the provision of Article 27 cuts across the Rome Statute as a whole provided the Statute is triggered, save where expressly provided to the contrary.

Article 98 should have been one such an exception but it is not. First, Article 98 specifically applies not as a ‘principle’ of the statute but rather an exception directed at the “court” when determining whether or not a ‘request for arrest and surrender’ seeking the cooperation of states parties should issue.³⁷¹ As earlier mentioned, ‘a request for arrest and surrender’ should not be confused with Warrants of Arrest. While the latter is situated in and regulated by the cooperation regime of Chapter IX, applications for warrants of arrest are made pursuant to Article 58, under separate conditions and terms and in my view independently of the considerations of Article 98.³⁷² This should explain why even Gaeta, who is critical of the ICC ‘request for arrest and surrender’, still, accepts the Court’s issue and circulation of an arrest warrant against Al Bashir as lawful.³⁷³ The logical explanation is that the two (a warrant of arrest and a request for surrender and assistance are separate legal instruments). Even so, Article 98 does not completely prevent all issue/transmissions of a ‘requests for arrest and surrender’, since a request could pursuant to Article 87 (b) be transmitted to none states entities but to the

³⁶⁹ The Rome statute, according to Judge Kirch, establishes as a two pillar system, a judicial pillar represented by the court (ICC) and an enforcement pillar represented by the states (ICC state parties). This would mean that an Article that directed to the statute as a whole applies both to the ICC and to ICC state parties, which would be the nature of Article 27.

³⁷⁰ ICC *al Bashir Arrest Warrant Decision* paras 44-45

³⁷¹ See Article 98 begins with “The Court may not proceed with a request for surrender or assistance....”

³⁷² See Article 58 of the Rome Statute. In my view Article 98 seems not barring the issue and circulation of arrest warrants as that is regulated by Article 58

³⁷³ Gaeta, *loc. cit.*, fn 1

“International Criminal Police Organization or any appropriate regional organization.”³⁷⁴ The other issue to consider is the drafter’s choice of language. In contrast to the use of the verb “shall” in Article 27, Article 98 employs the word “may”; it states, “The Court “*may*” not proceed with “*a request for surrender or assistance*” which would require the requested State to act inconsistently [...]”³⁷⁵ This clear utilization of a non mandatory word suggest that some degree of flexibility has been granted to court in the determination of whether or not to proceed with a *request for surrender or assistance*; a duty which squarely is placed within the Court’s realm. Gaeta argues that the use of these contradistinctions (“shall” and “may”) should only create “problems to non-native English speakers,”³⁷⁶ a view I find not very convincing. The verb “shall” is by no means the same as “may” within a legal interpretation regime. It is an established canon that these two are not synonyms.³⁷⁷ Use of the verb “shall” generally carries a ‘mandatory’ rather than the ‘discretionary’ meaning attributed to the verb “may.” Their import is to weed out ambiguity so as to convey with clarity the nature of a given power. The plethora of judicial decision supports the need for a distinction. In *Rastelli v. Warden, Metro. Correctional Center*, it was distinguished that “[t]he use of a permissive verb — ‘may review’ instead of ‘shall review’ — suggests a discretionary rather than mandatory review process.”³⁷⁸ Further in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the US Court expressly stated that “The mandatory ‘shall’ [...] normally creates an obligation impervious to judicial discretion.”³⁷⁹

³⁷⁴ See Article 87 (1) (b) of the Rome Statute

³⁷⁵ Article 98 (1) As noted earlier a request for surrender and assistance is different from an Arrest Warrant issued pursuant to Article 58

³⁷⁶ See Gaeta loc., cit., fn. 359 at 328

³⁷⁷ *Rastelli v. Warden, Metro. Correctional Center*, 782 F.2d 17, 23 (2d Cir. 1986); see *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). *Bankers Ins. Co. v. Florida Res. Prop. & Cas. Jt. Underwriting*, also see *Lopez v. Davis*, 531 U.S. 230, 241 (2001) Ass’n, 137 F.3d 1293, 1298 (11th Cir. 1998).

³⁷⁸ *Rastelli case supra*.

³⁷⁹ *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

Additionally, while context is important, nothing in the text of Article 98 read in the present context suggest that the use of the verb “may” gave the provision a mandatory character. On the contrary, the several preliminary requirements therein,³⁸⁰ coupled with the discretionary option of entering into a negotiation for cooperation with a third state for waiver of immunity speaks to the flexibility within the court’s reach when making use of Article 98.

Gaeta further makes reference to the Spanish and French version of the statute to buttress her view point.³⁸¹ But it may be safer to rely more on established canons of statutory interpretation and treat with care other translations manoeuvres. Those aside legal texts must be read in their broader statutory context, in harmonious whole, taking into account where applicable, the sub-headings given to provisions within a statute.³⁸² Looking at the two provisions Article 98 and Article 27 independently, each provision is under a distinct sub-heading. Such categorization must inform an interpreter of each provision’s range or radius of application.

Article 27 appears to speak generally and in broad terms on the “*Irrelevance of official capacity*” and is directed at the Rome Statute as a whole; this can be seen from its opening statement states “*This Statute ‘shall apply equally to all persons’ ‘without any distinction based on official capacity.’*”³⁸³ The encompassing character of this provision was confirmed by Pre-Trial Chamber 1 in the *Omar Al Bashir Arrest Warrant case*.³⁸⁴ Article 98, on the other hand, appears not to have the same range of application accorded to Article 27. This is evident in its sub-heading (“*Cooperation with respect to waiver of immunity and consent to surrender*”) and

³⁸⁰ It may include; the determination of whether a particularly request posses competing international legal obligations on the requested state under international law. The court must also satisfy itself that it has failed to obtain cooperation of the third state. It also may necessitate a case-by- case-basis determination on each request.

³⁸¹ Gaeta loc., cit., fn 359 at 328

³⁸² See IA Sutherland, *Statutes and Statutory Construction* (2002) 25, 6th ed. Rev. Norman J. Singer.

³⁸³ Article 27 sub-heading.

³⁸⁴ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, para 41-45.

its opening phrase (“*The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently [...]*”).³⁸⁵ The ICC Pre-Trial Chamber I in the *Omar Al Bashir Arrest warrant decision* restated the superiority nature of principle embodied in Article 27.³⁸⁶ This cannot be said of Article 98. As an embodiment of a ‘core principle,’ the underlying principle of Article of 27 must be read into every provision of the statute.³⁸⁷ This reading does not reduce in any material particulars the content of other provisions within the statute or that of Article 98. Instead it should strengthen them.

Since the Rome Statute operates within the broader umbrella of international law—and was drafted with extensive reference to international law,³⁸⁸ Article 98 stands as evidence to the statute’s adherence to the treaty law principle *pacta tertiis nec nocent nec prosunt*; the principle that treaties do not create obligations, nor confer rights, on third states without their consent.³⁸⁹ The Rome Statute being a treaty is governed by this principle. As such the treaty rule of voluntary consent became the means by which states became party to the Statute. With this in mind, its drafters were also aware that some states would not consent to the statute, and thereby its terms. Thus a provision had to be created to address, particularly, the dealing of the court with non-state parties. Recognizing this basic rule does not undermine the overall object of the Article 27. Thus, with reference to those states (non-contracting parties), the provision of Article 98 allows the court, in a separate agreement, to seek their consent with respect to cooperation, including the waiver of obstacles (in this case immunity) in the event the indictee is a national of a that state. This duty rest squarely with the court and is not open to any major loopholes.

³⁸⁵ Article 98

³⁸⁶ The ICC Decision for Issue of Arrest Warrant for Omar Al Bashir page 45

³⁸⁷ In other words, the principle embodied in Article 27 permeates the statute as a whole.

³⁸⁸ The Rome statute although an independent statute does not operate in isolation of international law.

³⁸⁹ See Article 34 of the Vienna Convention on the Laws of Treaties, states that “A treaty does not create either obligations or rights for a third State without its consent.”

Judge Hans-Peter Kaul,³⁹⁰ former head of the German Delegation to the Preparatory Commission of the International Criminal Court and now Judge of the ICC,³⁹¹ offers a very interesting illustration of how Germany intends to interpret Article 98. He states that under the German ICC Implementing Legislation, any claims of official immunity will simply be rendered as inadmissible when acting on an ICC request to surrender — not because Germany thinks such immunities do not exist at all, but rather because it is “up to the ICC to decide on the existence and the scope of any such immunity.”³⁹² He adds that “if the Court comes to the conclusion that immunities exist, it will decide not to proceed with the request as is provided in Article 98.”³⁹³ And he correctly notes that “states may bring their views regarding conceived problems with immunity before the Court at any time.”³⁹⁴ This is expressly provided for in Article 97.³⁹⁵ Kaul sums this in what he coined as “the principle of who has the last say.”³⁹⁶ He rationalizes the drafter’s intent as ensuring that the duty to cooperate with the court is mandatory and not elective. He argues that if states had the last say as to whether or not to cooperate or to elect when and when not to cooperate with the ICC, the Court would practically never function.³⁹⁷

This is a very logical opinion, particularly when one considers that no trial under the Rome Statute is permitted without the suspect’s attendance in person, and that the statute prohibits the trial of suspects in *absentia*. In conclusion, I am of the view that the two

³⁹⁰ See presentation by Hans-Peter Kaul, Head of the German Delegation to the Preparatory Commission of the International Criminal Court during an event hosted by the NGO Coalition for the International Criminal Court (CICC) during the 9th session of the Preparatory Commission for the International Criminal Court at UN Headquarters in New York on 18 April 2002.

³⁹¹ Hans-Peter Kaul, has been Judge in the ICC Pre-Trial Division (since September 2003) and Second Vice President of the ICC since March 2009 and See <http://www.iccnw.org/?mod=judgespresidency> (Last visited 2009)

³⁹² *Id.*,, page 8

³⁹³ *Id.*,,

³⁹⁴ *Id.*,, also see Article 97 and Article 119 of the Rome Statute

³⁹⁵ See Article 97 which provides that “ Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter.

³⁹⁶ See Hans-Peter Kaul *loc. cit.*, fn 409 para 8.

³⁹⁷ *Id.*,

provisions, although to some extent confusing, are not inherently at odds. They can be reconciled as discussed above. Failing the above suggestions, and further basing on the hierarchy established by Article 21, it would also be advisable that any dispute relating to the interpretation of, or settlement of disputes relating to the Rome Statute, should be dealt with in accordance with Article 119, which provides, that; “Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties.”³⁹⁸ It further adds that “the Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.”³⁹⁹

Mindful of the above provision, and of the provision of Article 97 which provides that states, upon receipt of a request for assistance, may bring their views regarding conceived problems to the ICC at any time, I would argue that the conceived problem with the interpretation of Article 98 and Article 27 should be sent to the ICC, which henceforth may, if needed, refer the matter to the International Court of Justice for interpretation. As of now, I know of no state that has drawn the courts attention on this matter.

4.1.5 The Arrest Warrant for President Omar Al Bashir: The Debate on State Party Obligation to Give Effect to the Arrest Warrant.

The UN Security Council referral⁴⁰⁰ of situation in Darfur, Sudan to the ICC and the ICC unprecedented judicial measures of 4 March 2009⁴⁰¹ against President Omar Al Bashir of Sudan

³⁹⁸ Article 119 of the Rome Statute

³⁹⁹ Id.,

⁴⁰⁰ The situation in Darfur Sudan was referred to the Office of the Prosecutor of the ICC by UN Security Council Resolution 1593 of 2005, See Res/1593/2005.

and 5 others has spurred a lot of legal debate.⁴⁰² While some see the combined ICC and UN Security Council measure as a “bold”, “strong and courageous” gesture in support of redress for victims of the atrocities in Darfur.⁴⁰³ Others view the measures as insufficient to secure Al Bashir’s arrest and surrender to the court, due to the apparent conflict between the rules of immunities for an incumbent heads of state and those norms relating to criminal prosecution of international crimes. On ground, Sudan, the state of nationality of the accused has unequivocally rejected in *toto* the ICC’s present assertion of jurisdiction on its territory and over its nationals.⁴⁰⁴

To add to these complexities, now emerges a sharp scholarly divide in legal scholarship questioning the legality of request for cooperation and assistance submitted to States Parties’ on 6 March 2009, in accordance with the cooperation terms of Chapter IX of the Rome Statute. The contention is that States parties to the Rome Statute can avoid their obligation to cooperate with court by simply interpreting Article 98 (1)⁴⁰⁵ in a manner that accords Al Bashir immunity. This dilemma arises because of the current obscure state of law on jurisdictional immunities. Plainly, it is not immediately clear whether the execution of such a request, which requires the exercise of the authority of one state over another state’s incumbent head of state (as is the case with the current request for the arrest and surrender of Sudan’s head of state), is not at odds with the

⁴⁰¹ Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009 <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (Last visited Oct 27 2009).

⁴⁰² See Christopher Gosnell “The Request for an Arrest Warrant in Al Bashir, Idealistic Posturing or Calculated Plan?” *Journal of International Criminal Justice* 6 (2008), 841-85. The author views the “the decision to seek President Al Bashir’s arrest, assuming that the evidence substantiates the request, as part of a longer term pragmatic strategy.”

⁴⁰³ Also see Robert Cryer “Sudan, Resolution 1593, and International Criminal Justice” *Leiden Journal of International Law*, 19 (2006), 195–222 Cryer stated that “Resolution 1593 might be seen as strong action by the Security Council, and in many ways it was.”

⁴⁰⁴ Mahaz Faidul, spokesperson for President Al Bashir, has continued to threaten that “it will be nothing less than ending all our agreements with United Nations” see Sudan President Vow not to Extradite a Single Cat to the ICC, Sudan, Tribune, 18 December, 2008, at <http://www.sudantribune.com/spip.php?article29615> (Last visited Oct, 09)

⁴⁰⁵ Article 98 (1) of the Rome Statute has been the subject of analysis in the previous section 4.1.2

immunities that Omar Al Bashir should, as a sitting president of a sovereign state, that is more over not party to the Rome Statute enjoy under international law.

At their deepest level, the issues, as you will see, relate to the enforceability of the ICC's judicial decisions, the legal weight, if any, of Resolution 1593 of 2005 that referred the situation in Darfur to the ICC and overall the relationship between Article 13 (b), the ICC and the UN Chapter VII Security Council's mandates. As concerns continuity of proceedings against charged suspects, the ICC statute does not permit trial in absentia, yet the challenges are very evident in the number of outstanding arrest warrants and need no further emphasise.⁴⁰⁶ On the other hand, head-of-state immunity is an area of law that has never been authoritatively delineated although it is not new. Therefore, the actual state of the law as it stands remains obscure.⁴⁰⁷ It is very likely that this debate is not devoid of the usual extrapolations and interpolations that often characterize legal discourse on unclear subjects. Therefore, the discussion about what the ICC States Parties currently in receipt of the above request legally should or should not do has a wide-ranging impact on international criminal justice as a whole; it also demonstrates the enormous challenges lying ahead in the effort to securing the criminal responsibility of those who occupy high governmental offices —and seem protected by the law of immunity—yet they seem to want to act with impunity.

One scholarly view argues that, with the exception of Sudan, (upon which there is an express UN Security order to fully cooperate with the ICC), the other states that received the ICC Arrest Warrant for Al Bashir are *not* legally obliged to cooperate with the court. According to

⁴⁰⁶ The Judges have issued 8 Arrest Warrants but only one has been executed. See ICC Marks Five Years since entry into Force of the Rome Statute, Judge Phillipe Kirsch.

⁴⁰⁷ The International Law Commission Special Rapporteur is currently working on "Official Immunity From Criminal Jurisdiction of Foreign State, discussed in Chapter 3.

Paolo Gaeta,⁴⁰⁸ Lucas Buzzard,⁴⁰⁹ and Michiel Blommestijn, Cedric Ryngaert,⁴¹⁰ in separate scholarly, ICC's request for the cooperation and assistance in the arrest and surrender of Al Bashir in his current position as a head of state of a sovereign third state in the absence of an official waiver, contravenes the immunity that Al Bashir should enjoy under international law"⁴¹¹ and thus of no legal effect.⁴¹² They base their conclusion on three key considerations, viz; the treaty-based character of the ICC, the delimiting language of Resolution 1593, and the cooperation terms of Article 98. In Gaeta's view, the leading exponent, the ICC decision to request cooperation and assistance from ICC states parties without first obtaining a waiver from Sudan was issued in contravention of Article 98 and therefore it is an "act ultravires."⁴¹³ Lucas Buzzard makes similar arguments, but assigns emphasis to the treaty-based rule,⁴¹⁴ to argue that the laws of treaties forbid (regardless that a treaty may be establishing an international criminal court) the imposition of treaty regimes on third states without their consent.⁴¹⁵ Buzzard states that the above rule cannot be tempered by just a UN Security Council Chapter VII resolution. In the views of Buzzard and Gaeta, and, a UN Security Council referral within the Rome Statute framework is "simply a 'trigger mechanism'"⁴¹⁶ like any other which should not be understood

⁴⁰⁸ Paola Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" *Journal of International Criminal Justice*, Volume 7 (2009) Issue 2 Oxford University Press, 2009, pg 325.

⁴⁰⁹ Lucas Buzzard "Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir" *American University International Law Review* 2009 24 Am. U. Int'l L. Rev. 897

⁴¹⁰ Michiel Blommestijn, Cedric Ryngaert, "EXPLORING THE OBLIGATIONS FOR STATES TO ACT UPON THE ICC'S ARREST WARRANT FOR OMAR AL-BASHIR" Working Paper No. 48 - April 2010 http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp48.pdf (Last visited May 2010).

⁴¹¹ Gaeta loc., cit., fn. 9 page 325

⁴¹² Id.,, pg 325

⁴¹³ Id.,, at 329

⁴¹⁴ Lucas Buzzard loc., cit., fn 431 at 932 Buzzard adds "In the case of Al-Bashir, this inconsistency may mean that the Court has issued a warrant that cannot be enforced while Al-Bashir is in power."

⁴¹⁵ Id.,

⁴¹⁶ Supra, Paola Gaeta, in pg 330 Gaeta states that "As [...] already noted above, under the ICC Statute a referral by the Security Council is simply a mechanism designed to trigger the jurisdiction of the ICC, admittedly also with respect to crimes committed in the territory or by nationals of states not parties to the ICC Statute. It is nothing more than that."

as a measure elevating the treaty based-ICC into a Subsidiary Organ of the UN Security Council or placing the ICC on the same footing as the ICTY or the ICTR which, unlike the ICC, were both created by a UN Chapter VII mandate to serve as Subsidiary Organs of the UN Security Council.⁴¹⁷ In the further alternative, these scholars contend that the language of Resolution 1593 has limited force in so far as mandatory cooperation from states other than Sudan is concerned since it merely “urges” other UN Member States to “fully cooperate.”⁴¹⁸ In their opinion, this urging is no more than a call to give support to the court if other states so wish. The overall argument can be summed up in the terms that are well articulated by Gaeta:

to assert that an international criminal court can “lawfully” issue and circulate an arrest warrant against individuals entitled to personal immunity before national courts, is not tantamount to saying that states can ‘lawfully’ arrest those individuals and surrender them to the requesting international court.⁴¹⁹

In contrast, another group of scholars argues that State Parties to the Rome Statute have a legal obligation to arrest and surrender Al Bashir if he enters their jurisdiction. The leading view in this group is perhaps that of Dapo Akande,⁴²⁰ later joined by Craig and Ssenyongo.⁴²¹ Akande relies on the legal nature of the UN Chapter VII Security Council Resolution 1593, which determined the situation in Darfur as a threat to international peace and security under Chapter VII. He also draws on a holistic reading of the Rome Statute taking into account the principle of effective treaty interpretation; requiring provisions of a treaty to read as whole taking in account

⁴¹⁷ See *e.g.* Buzzard loc. cit. fn 933 notes that “[...] the ICC, as a tribunal created through an international treaty and not through a Security Council resolution, does not have the automatic authority to disregard immunities, especially when it comes to officials of non-State Parties” In his view in the absence of a definitive SC resolution on the question of Al Bashir’s immunity, states that give effect to ICC’s request will do so in breach of his immunity.

⁴¹⁸ See Para 2 of Res/1593/2004 Supra which states that “ [...] and while recognizing that States not party to the Rome Statute have no obligation under the Statute, “urges” all States and concerned regional and other international organizations to cooperate fully.”

⁴¹⁹ See Paola Gaeta “Does President Al Bashir Enjoy Immunity from Arrest?” *Journal of International Criminal Justice*, 7 no. 2 (2009):325.

⁴²⁰ Key in this group, see Dapo Akande, “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities” *Journal of International Criminal Justice* 7 no. 2 (2009): 335

⁴²¹ Ssenyonjo, M., ‘The International Criminal Court arrest warrant decision for President Al Bashir of Sudan’ (2010) *International & Comparative Law Quarterly* 205.

its object.⁴²² Ssenyongo and Craig present similar views.⁴²³ To this group, there is not a single legal obstacle barring the arrest of Omar Al Bashir and his surrender to the Court by ICC States Parties in receipt of the warrant and the “request for arrest and surrender” should he ever avail himself within their territories. If there are any, they argue that such challenges would probably be political than legal.

Further, this group refute the claim that the ICC *request for cooperation and assistance* poses competing obligations on State Parties, that is, a duty to respect the immunity of Al Bashir as a national of a third state and a separate duty to comply with their obligation to cooperate with the court, or that it was a decision issued in contravention of Article 98. In their opinion, the UN Security Council Resolution effectively removed Al Bashir’s immunity and placed Sudan in the same position as other ICC Member States with regard to the obligation to cooperate fully with the court in the Sudan situation; which in this respect include arresting any Sudanese national wanted by the ICC in respect of the Darfur situation. Even, with this nature of duty, they do not purport anywhere that Sudan thereby becomes a party to the Rome Statute, or that the treaty rule *pacta tertiis nec nocent nec prosunt* has been contravened.⁴²⁴

Before I delve further into the merits of these arguments, I should provide a brief overview of how the ICC came to exercise jurisdiction over Sudan, and, ultimately, to issue Warrants of Arrest for six of its nationals, including Ahmad Muhammad Harun (“Ahmad Harun”); Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”); the incumbent president, Omar Al Bashir; and Saleh Jamus,⁴²⁵ Abdallah Nourain⁴²⁶, a Darfurian rebel leader, Bahr Idriss Abu Garda⁴²⁷, who recently voluntarily surrendered to the court.⁴²⁸

⁴²² Akande loc., cit., fn.430 at 336

⁴²³ Ssenyonjo loc., cit., fn.431 page 208

⁴²⁴ See Supra Akande.

⁴²⁵ ICC-02/05-03/09, Issued under seal on 27 Aug, 2009,

The Security Council, acting under its peace and security mandate of Chapter VII of the Charter of the UN, determined as long ago as 2004 in Resolution 1556, that the situation in Sudan constituted a threat to international peace and security and to stability in the region.⁴²⁹ In September 2004, the council, again acting under Chapter VII of the UN Charter, adopted Resolution 1564,⁴³⁰ which requested that the then UN Secretary-General Kofi Annan establish an international commission of inquiry into reports about the alleged violation of international humanitarian law and human rights law on going in the Darfur region of Sudan. This commission was requested to also determine whether acts of genocide have occurred and to identify perpetrators of such violation with a view of holding those responsible accountable. In October 2004, in light of Resolution 1564, the Secretary-General established the International Commission of Inquiry on Darfur (ICID) with a mandate as per Resolution 1564.⁴³¹ The ICID, which concluded its assignment within a year, delivered a high-quality report to the UN Secretary-General on January 25, 2005, in which it recommended that the situation in Darfur be referred to the ICC.⁴³² Thus, basing of the ICID recommendation, the Security Council on 31 March 2005 acting pursuant to Chapter VII of the UN Charter⁴³³ adopted Resolution 1593 of 2005,⁴³⁴ by a vote of 11 in favour to none against, with four abstentions (Algeria, Brazil, China and the United States) which invoked Article 13 (b) of the Rome Statute to refer the situation

⁴²⁶ Id.,, Issued under Seal on the same day.

⁴²⁷ ICC-02/05-02/09 Unsealed warrant issued on 17 May, 2009

⁴²⁸ See ICC-02/05, Darfur, Sudan, [www. Icc.org](http://www.icc.org). (Last visited Oct, 2009).

⁴²⁹ United Nations Security Council Resolution 1556 July 2004, SC/RES/1556/2004 <http://www.un.org/News/Press/docs/2004/sc8160.doc.htm> (Last visited 29 Oct 2009).

⁴³⁰ See United Nations Security Council Resolution S/Res/1564/2004, adopted by the Security Council at its 5040th meeting, on 18 September 2004.

⁴³¹ See “Secretary-General Establishes International Commission of Inquiry for Darfur” Press Release SG/A/890 AFR/1046/HR/4797 , 571-572 <http://www.un.org/News/Press/docs/2004/sga890.doc.htm>, (Last visited Oct, 2009)

⁴³² See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’, 25 January 2005, at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. (Last visited Oct 20 2009).

⁴³³ See Para 1, and 2 of Res. 1593 of 2005.

⁴³⁴ Resolution 1593 of 2005, or S/RES/1593 (2005) was Adopted by the Security Council at its 5158th meeting, on 31 March 2005. A copy of the Resolution can be found on UN website at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>(last visited Oct 20 2009.)

ongoing since 1 July 2002 in Darfur, Sudan to the Office of the Prosecutor of ICC. On receipt of the referral, the Office of the Prosecutor undertook a pre-investigation evaluation based on the available information and concluded that there was a “reasonable basis” to proceed with a formal investigation. Hence, an investigation⁴³⁵ was opened on 6 June 2005.⁴³⁶ Since then, six Warrants of Arrest have been issued.

The third arrest warrant is essentially where the debate is centered. On 4 March 2009, the Pre-Trial Chamber I (PTC) of the ICC issued an arrest warrant for Omar Al Bashir, the incumbent President of Sudan, who had been indicted in 2008.⁴³⁷ In issuing the warrant, the PTC’s noted that it was satisfied (with the exception of the allegation of genocide)⁴³⁸ “that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under Article 25(3)(a) of the Statute as an indirect perpetrator or as an indirect co-perpetrator for war crimes and crimes against humanity”⁴³⁹ committed in Darfur since 1 July 2002.⁴⁴⁰ Ultimately, the ICC satisfied itself that, under Article 58 of the Rome Statute, Al-Bashir’s arrest was necessary to guarantee his appearance at trial, to prohibit him from obstructing or endangering the proceedings, and to ensure that he does not commit further atrocities in Darfur.⁴⁴¹

In issuing the arrest warrant, the Pre-Trial Chamber I directed the Registry to transmit as soon as practicable a request for cooperation in the arrest of Al Bashir. On the 6 March 2009, the

⁴³⁵ For Details see The Prosecutor of the ICC opens investigation in Darfur ICC-OTP-0606-104, found on ICC website last visited Oct 20 2009.

⁴³⁶ See Report of the International Criminal Court to the United Nations for 2007/2008 United Nations Doc A/63/323 pg 10, Distr.: General 22 August 2008.

⁴³⁷ The warrant of arrest for Omar Al Bashir lists 7 counts on the basis of his individual criminal responsibility under (article 25(3)(a)) including: five counts of crimes against humanity: murder, extermination, forcible transfer, torture, and rape and two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities and pillaging. Genocide is not listed.

⁴³⁸ *Id.*, pp. 3, The March 04, 2009 warrant of Arrest doesn’t list genocide among the charges for which Omar Bashir is wanted. An Appeal has been filed for amendment to include genocide. Likely it will be granted. My view is that the Pre-Trial Chamber erred in its ruling. Evidence at this stage need no further scrutiny save reasonableness.

⁴³⁹ ICC-02/05-01/09 The Prosecutor v. Omar Hassan Ahmad Al Bashir para 5.

⁴⁴⁰ *See*. “Decision on the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” ICC-02/05-01/09-1 Case The Prosecutor v. Omar Hassan Ahmad Al Bashir Situation in Darfur.

⁴⁴¹ *Id.*, pg 8

Registrar circulated the request for cooperation and assistance to the ICC's State Parties, to members of the Security Council that are not party to the ICC, and to all UN Member States. This marked the first time in the court's history that a sitting president is being sought to answer for alleged crimes by the ICC. Before this incident, past incidences had depicted the ICC as a court that mainly goes after rebels. Now that the ICC has indicted and is requesting the arrest of a person holding the highest governmental position, attention has shifted to the question about whether the official immunity granted to an incumbent president of a state that is not party to the Rome Statute should or should not protect Al Bashir from arraignment before the court. The other issue has been whether ICC State Parties that act on the basis of this arrest warrant will not be committing an international wrongful act forbidden under the principle of sovereign equality.

Dapo Akande suggested in a 2009 article that the answer to the question of whether states are entitled to act on the ICC's request for the arrest and surrender of Al Bashir to the court "depends on whether the immunities that Al Bashir would ordinarily be entitled to enjoy have been removed."⁴⁴² He added that the resolution of this issue "[...] depends on the legal nature of Security Council referrals of situations to the ICC."⁴⁴³ To Akande, a Chapter VII Security Council resolution, such as Resolution 1593, places a state that is not a party to the Rome Statute in the same position as those states that are parties in terms of the duty to cooperate with the court. This is the point on which Gaeta and Buzzard substantially disagreed. As noted above, Gaeta is not persuaded by the view that the UN Security Council referral empowers the ICC any more than an ordinary trigger mechanism would. However, Gaeta does agree with Akande that one state that is under a clear international law obligation to arrest and surrender Al Bashir is

⁴⁴² Cf. Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" *Journal of International Criminal Justice* 7 (2009) Oxford University Press, 2009, pg 335.

⁴⁴³ *Id.*, pg 335.

Sudan itself, given its membership in the United Nations since 1956.⁴⁴⁴ This membership is seen as imposing *ipso facto* an obligation on Sudan per Article 25 of the United Nations Charter to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁴⁴⁵ Both scholars agree that Security Council resolution 1593 created an explicit international law obligation for Sudan, although one which Sudan has not been complying with.”⁴⁴⁶ And that includes the obligation to arrest any Sudanese wanted by the ICC.⁴⁴⁷ Akande also observes that the obligation to carry out a decision of the UN Security Council premised on Chapter VII would, in the light of Article 25 and Article 103 of the UN Charter, unseat any other obligation UN Member States may have under international law. He based his argument on Article 103 of the UN Charter, which provides that

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁴⁴⁸

In contrast, Professor Gaeta⁴⁴⁹ argues that the request to states parties to arrest and surrender President Al Bashir was issued in contravention of the Rome Statute, and that it is “an act *ultra vires*.”⁴⁵⁰ Her reason is that “[...]this request is patently at odds with Article 98(1) of the ICC Statute,”⁴⁵¹ which in her views places a mandatory and not an elective duty on the ICC to not proceed with a request for cooperation for arrest and surrender in situations where the

⁴⁴⁴ See List of Member States of the United Nations Sudan became a member on 12 Nov, 1956 also see website at <http://www.un.org/en/members/index.shtml> (Last visited Oct 22 2009).

⁴⁴⁵ See Id., Akande pg 335 also see Article 25 of the Charter of the United Nations Organization, (UN Charter 1945) it 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”.

⁴⁴⁶ See Akande, *supra* pg 335

⁴⁴⁷ Id.,

⁴⁴⁸ Id., Akande pg 335 Also see Article 103 of the UN Charter 1945, it provides “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

⁴⁴⁹ Paola Gaeta “Does President Al Bashir Enjoy Immunity from Arrest?” *Journal of International Criminal Justice* 7 (2009) Oxford University Press, 2009, pg 135. Paola Gaeta Professor of International Criminal Law, University of Florence and University of Geneva;

⁴⁵⁰ Id.,, Geata page 315

⁴⁵¹ Id., at 316

indictée is a national of a non state party and is entitled to immunity unless a waiver of immunity has been obtained. She relies on the French⁴⁵² and Spanish versions of the Rome Statute, which, she argues do not contain the verb “may,”⁴⁵³ but instead impose a mandatory obligation on the court with respect to Article 98(1) to submit that “any state other than Sudan that enforces the warrant against Al Bashir would violate international rules recognizing the immunity from arrest for incumbent heads of state.”⁴⁵⁴ She, however, concedes that the ICC’s act of issuing and circulating the Arrest Warrant in issue did not *per se* violate the rules of international law concerning the immunities of Omar Al Bashir as the incumbent head of state of Sudan.⁴⁵⁵ The challenge, she reiterated, relates to the execution of the warrant itself, which, in her view, lies not with the court but rather with the states whose cooperation has been sought. It is her view, that the “powers conferred upon an international court to derogate customary international rule on immunities does not extend to individual States from whom cooperation has been sought.”⁴⁵⁶ She views it as being “one thing to say that an international criminal court is not duty bound to respect international immunities accruing to some individuals[...],”⁴⁵⁷ but quite another “to assert that on the basis of an arrest warrant issued by an international court, a state which is expressly requested by that court to arrest and surrender an individual protected by personal immunities can lawfully disregard these immunities, simply because it [wants to] comply with a request for arrest and surrender of an international court.”⁴⁵⁸

⁴⁵² Id., page 328 The French text she quoted read: ‘La Cour ne peut poursuivre l’exécution d’une demande d’une demande de remise ou d’assistance:::’ and the Spanish text provides: ‘La Corte no dará curso a una solicitud de entrega o de asistencia :::’.

⁴⁵³ Gaeta states that “the ambiguities that a non-native English speaker may find in use of the modal verb ‘may’ are dissipated by the French and Spanish versions of the ICC Statute”.

⁴⁵⁴ Id.,, pg 316

⁴⁵⁵ Id.,,

⁴⁵⁶ Id.,, pg 320

⁴⁵⁷ Id., ,

⁴⁵⁸ Id.,,

The debate on this level is healthy, but some fundamental considerations seem missing from the start both from Akande's side and that of Gaeta's, although Akande's arguments appears to be of greater validity. In my view, the overall debate surrounding the referral and the obligation of ICC states parties to cooperate with the court cannot go without some conceptual and empirical examination of the underlying rationale underpinning the UN-ICC relationship.

Such Security Council decisions in generally do not emanate from the Rome Statute but from Article 39, 41 and 42 of the UN Charter. The ICC is only being made use of by virtue of the opening created by the enabling provisions of Article 13 (b). Thus firstly, and fundamentally, we should address *conceptually* the object underlying the inclusion of a mandate as important as a UN Security Council UN Chapter VII within the triggers of an 'ordinary' treaty-based court, knowing too well the inherent limitation of a treaty-based regime. Thereafter, we should then address *empirically*, why, (in the face of the apparent limitation) the UN Security Council still elected to go ahead with the Commission's recommendation to use the ICC, and not create new tribunals. Was this an error on the part of the council or essentially the concept to create this *ad hoc* interdependence between the ICC and UN peace and security mandate was a notion ill-conceived?

I want to believe that the Security would not take a measure that it knows is conceptually and/or practically futile and so would the ICC especially at the time of considering in its draft instruments a referral from the UN Security Council. It is widely agreed and believed, that right from the construction stage of the ICC, the UN had an interest in using the would be *permanent* ICC in its international peace keeping and security mandates —as creation new situation specific tribunals had become costly, and at times wasteful— given their temporal natures.⁴⁵⁹ This desire

⁴⁵⁹ Foreword by Adriaan Bos, *The Emerging Practice of The International Criminal Court*, (2009) 13 (ed) Edited by Carsten Stahn and Goran Sluiter. Martinus Nijhoff Publishers. Also see a similar argument put forward by Cryer in

led specifically to the inclusion of several provisions relating to UN Security Council mandates under Chapter VII of the UN Charter within the ICC Statute.⁴⁶⁰ It is precisely the reason why Article 13 (b) of the Rome Statute *expressly refers* and confines referrals from the UN Security Council *only* to Chapter VII powers and not any other? The consistent reference to UN Chapter VII actions are not without concrete objective, especially that decisions outside Chapter VII would not only be of lesser legal weight necessary to compel compliance of non state parties but would also not be accepted by the ICC given the conditions stipulated in Article 13 (b).⁴⁶¹ Overall it would be futile for the ICC to spend resources investigating a UN referral which is inherently lacking in legal force, and one in which cooperation from the concerned state cannot be secure.

Thus, Resolution 1593 of 2005 that referred the situation in Darfur to ICC was made upon a determination under Chapter VII of the UN Charter that the “situation in Darfur constitute[d] a threat to international peace and security.”⁴⁶² There is no question to the legality of this resolution or to its present finding. Its operative paragraphs 2, clearly uses mandatory language with respect to Sudan “cooperating fully” with the Court and Prosecutor, providing the [Court and the Prosecutor] with any necessary assistance.”⁴⁶³ By virtue of Article 25 of the UN Charter, it suffices that the Resolution sufficiently brought Sudan under ICC’s assumed

“Sudan, Resolution 1593, and International Criminal Justice” Leiden Journal of International Law, 19 (2006), pp. 195–222. Both argue that the purpose of the inclusion of a UN Security Council referral was to minimize the creation of ad-hoc tribunals; reasons for this shift relate to cost and effectiveness and time wastage as ad-hoc tribunals are situation specific and their mandates are not easily extendable. On this see the attempt to extend ICTY to cover situation Rwanda which flopped.

⁴⁶⁰ See Article , Referral 13 (b) deferral 16, funding Article 116, lack of cooperation from a referral article 87 (5) (a) etc.

⁴⁶¹ See U.N. Charter arts. 39-51 allows the Security Council to take action when peace is threatened or breached or an act of aggression has occurred, and providing the Security Council with the means to do so, both through authorizing the use of force and through other measures.

⁴⁶² See Para 1 of UN Security Council Res. 1593, adopted by a vote of 11 in favour, none against with 4 abstentions (Algeria, Brazil, China, United States).

⁴⁶³ See Para 2 “[...]the Council decided also that the Government of the Sudan and all other parties to the conflict in Darfur would cooperate fully with the Court and Prosecutor, providing them with any necessary assistance.”

jurisdiction.⁴⁶⁴ It should be remembered that this referral does not originate from the ICC Statute but the UN Charter. Even where there is a refusal of cooperation, it is not for the ICC to deal with it but rather the UN Security Council pursuant to the UN Charter. Article 87 (5) (a) of the Rome statute is very clear on this point.⁴⁶⁵

Thus such a measure cannot be said to carry a legal significance equal to other ICC statutory trigger mechanisms as Gaeta and Buzzard seem to argue. A referral does not make a State that is not party to the Rome Statute party to the treaty but it has the legal force to compel a third state to act with regard to that particular situation in providing assistance and cooperation to the ICC as if it were a state party to the Statute. This cannot be said of other triggers, for example, prosecution of nationals of third states who commits a crime in the territory of a State party.⁴⁶⁶ This is particularly so, because the UN Security Council in the fulfilment of its mandate to maintaining international peace and security, elects what measure to take when it addresses a particular threat.⁴⁶⁷ In the past, the Council has employed both the use of force,⁴⁶⁸ and the use of judicial structures.⁴⁶⁹ Buzzard who argues against execution of ICC arrest warrant in fact states that “[o]ne of the envisioned functions of the ICC was to act as a permanent tribunal that the Security Council could activate using its Chapter VII authority without the need to set up another

⁴⁶⁴ Article 25 of the Charter provides that ‘Members of the United Nations agree to accept and carry out the decisions of the Security Council ::: .’

⁴⁶⁵ Article 87 (5), (b), provides that “ [w]here a State not party to this Statute, [...]fails to cooperate with the court]... where the Security Council referred the matter to the Court, the Court may so inform, the Security Council.” This provision expressly implies that the UN Security Council’s job or mandate does not simply stop at referring a situation. The Council has to deal with subsequent non-cooperation and this dealing is outside the framework of the ICC statute. Compare this with a referral pursuant to an ad hoc agreement.

⁴⁶⁶ See Article 12 (2) (b) and Article 14 is not accompanied by legal force capable of compelling cooperation from the third states as a referral pursuant to the UN Charter and Article 13 (b) would.

⁴⁶⁷ See UN. Charter articles 39-51 allows the Security Council to take action when peace is threatened or breached or an act of aggression has occurred, and providing the Security Council with the means to do so, both through authorizing the use of force and through other measures); See e.g. Kuwait invasion. Security Council Resolution 660, August 2, 1990, *International Legal Materials*, vol.1325, 1990, p. 29.

⁴⁶⁸ See e.g. Kuwait invasion. Security Council Resolution 660, August 2, 1990, *International Legal Materials*, vol.1325, 1990, p. 29.

⁴⁶⁹ See the ICTR UN SC. Res. 827 of 1993 and the ICTY UN SC, Res 955 1990

ad hoc tribunal such as the ICTY or ICTR.”⁴⁷⁰ Thus, there is nothing awkward in the council’s choice to use a treaty-based structure, as it has done in the situation of Sudan especially where enabling legal provisions permitted.⁴⁷¹ It may also choose to create new tribunals, as the case was with ICTY and ICTR.⁴⁷² The actions in various situations do not have to be identical.

One may argue that since the UN Security Council during the referral specifically withheld funding to support the ICC in its investigation,⁴⁷³ it was not a UN Chapter VII mandate proper. While mention is made in Article 115 (b) to funding by the “United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses *incurred* due to referrals by the Security,” nothing suggest in the language of text of Article 115 that this funding is a pre-condition for UN Security Council referrals to the ICC. Besides, funding is not a determinant of the propriety of a UN Chapter VII mandate. In addition, the reference to UN funding comes across as in relations to “expense incurred.”⁴⁷⁴ Meaning, there is no requirement for a *pre-referral financing* although a funding claim may later arise.⁴⁷⁵ But importantly, a reminder is needed that the ICC as an independent criminal judicial organ can better preserve its independence and integrity when funding is not tied to any of its trigger mechanisms; this is essentially so, if the ICC is to avoid cases of having money influence the court’s actions.⁴⁷⁶

⁴⁷⁰ Lucas Buzzard loc.,cit., fn 432 at 939

⁴⁷¹ See Article 13 (b) of the Rome Statute

⁴⁷² See the ICTR UN SC. Res. 827 of 1993 and the ICTY UN SC, Res 955 1990

⁴⁷³ See Para 7 “none of the expenses incurred in connection with the referrals including expense related to investigations and prosecutions in connection with the referral, shall be borne by the United Nations, ...”

⁴⁷⁴ Unfortunately, this is the same language the Resolution employs, it bars later claims, see para7.

⁴⁷⁵ For ICC funding see, Article 115 (b), Article 115 (b) and Article 116, of the Rome Statute, providing respectively that funding for the operation of the court are obtained through (a) “[a]ssessed contributions made by States Parties;” (b) “[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses *incurred* due to *referrals by the Security Council.*,” and (c) through voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.”

⁴⁷⁶ Also it is noteworthy noting that self-referrals by states parties, (or by third states through *ad hoc* agreements) do not require that those states finance the ICC’s investigation or the prosecution that arose.

The other argument scholars make is that the UN in its Resolution 1593 did not explicitly address the question of immunity whereas it should have.⁴⁷⁷ The time for the Security Council to follow with a definitive resolution on the question of immunity was not then,⁴⁷⁸ but rather now, that the question of immunity has arisen and Sudan is not cooperating. Then was an investigation stage *not* of the *case* against President Al Bashir but of the *situation* in Darfur, Sudan. However, this is not to say Resolution 1593 is without flaws. The Resolution, for example, stipulated that those nationals and current or former officials or personnel from a contributing state outside the Sudan that was not a party to the Rome Statute would not be subject to the ICC's jurisdiction and investigation, but instead to the exclusive jurisdiction of contributing states.⁴⁷⁹ The inclusion of this provision definitely arouses skepticism. Further the resolution in its paragraph 6 makes reference to Article 16 and Article 98 of the Rome Statute without a heed to 13 (b) which is in fact the provision enabling it to proceed with the referral to the Office of the prosecutor. And in contrast, no mention is made of Article 27 which contains a "core principle" of the statute, yet it went on in paragraph 6 to recognize the existence of immunity accorded in Article 98.⁴⁸⁰

If the validity of the Resolution 1593 stands, then it would be right to hold that there is a valid UN Charter VII power stemming from referral. In light of Article 25 of the UN Charter, Sudan is obliged to fully cooperate and assist the ICC. And in light of Article 103, this duty overrides other international duties including immunity that Sudan may want to claim. In other words, Sudan can not base its refusal to cooperate on international law. Further, the ICC is not

⁴⁷⁷ See Gaeta, Buzzard, Akande, Williams and Sherif cited earlier.

⁴⁷⁸ To ask this of the Security Council at the stage of a referral (requiring ICC to investigate, and prosecute upon finding a basis) would have been strategically unwise, if not placed the investigation in jeopardy. In fact, had the resolution contained such an express reference to the immunity question, the impartiality of the ICC investigation would have been portrayed as compromised since such a reference would clearly suggest that the targets of the referral were the political leadership otherwise entitled to immunity.

⁴⁷⁹ Supra See Para 2 of Resolution 1593.

⁴⁸⁰ See para 4 of UN Security Council res. 1593 which states, "Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute."

going to deal with Sudan's lacking of cooperation within the framework of the Rome Statute, but shall in accordance with Article 87 (5) refer the lack of cooperation back to the Security Council to be dealt with in accordance with the UN Charter.

In the circumstance, the obligations that flow from the UN Charter is different from those flowing from the ICC Statute. Directly to ICC State Parties are the general treaty obligation of 86 and the specific obligations laid down in Article 87 subject in this case to Article 98 given that Sudan is a *third state* (a state not party to the ICC Statute). The question of Article 98 as dealt with in the previous section of this work, would beg an enquiry on whether there is a need for ICC to seek a waiver of immunity from Sudan in order to seek Al Bashir's arrest and surrender. Gaeta and Buzzard answer in the affirmative. Akande and Ssenyongo answer in the negative. I join Akande in answering in the negative.

In my view, the above it depends on whether, the immunity of Sudan and their national were not tempered with or left intact by the referral. Impliedly not, the referral has ordered Sudan to do what it would not have done. That is to cooperate fully and assist a treaty-based regime to which it is not party. This order has allowed the exercise of a foreign judicial power inside the territory of Sudan without Sudan's consent but by force of the UN Charter pursuant to Article 25 of the Charter. The sovereign immunity of Sudan has effectively been removed. Even Gaeta and Buzzard concede that ICC has effectively assumed jurisdiction over Sudan and have lawfully issued arrest warrants in regard. The remaining limb of the question thus, is whether this removal of immunity protects ICC States Parties that are under a treaty obligation to act as the enforcement pillars of the ICC in the exercise of its jurisdiction. *Practically*, this would depend on whether, without the States parties performing their part of the treaty, ICC can still exercise its assumed jurisdiction. Specifically, whether in the absence of Al Bashir's presence in court, trial

can proceed. The answer is in the negative since ICC statute bars trial in *absentia*. Conceptually, one has to look at whether in arresting Al Bashir in pursuance to the ICC statute, states would be subjecting him to their domestic regimes so has to tantamount to the exercise of a coercive act of one state over the other and thus a breach of international law immunities. In my view ICC State parties domestic laws in relations to request for arrest and surrender are merely *enabling* laws having accepted that they would act as an enforcement pillar of an international court. The arrest in not made in the name of the arresting country but the ICC unless “cooperation for a waiver of immunity is required of the ICC”. In the case of Sudan, the ICC did not require to seek a waiver as the referral done so. In this view, ICC States parties would be in no breach. Built into the ICC statute is a fully fledged mechanism for back-and-forth collaboration between the *statute’s judicial pillar* (the ICC) and the *statute’s enforcement pillar* (the State Parties). If a State Party that receives a request from the court finds that it cannot for some reason act on the request, Article 97 provides that the concerned state should consult the court.⁴⁸¹

Akande with whom I agree substantially, was of the view that the court was negligent in not considering Article 98 when issuing Al Bashir’s warrant. I think leaving out Article 98 analysis in Al Bashir’s Arrest Warrant decision was not necessarily an omission because first; the Al Bashir Arrest Warrant decision was decided on an application made pursuant to Article 58. There is no requirement under the statute that the determination of whether or not an Arrest Warrant should issue should be subject to the resolution of a question arising from Article 98. As I argued in Chapter 4.1.3, the issuance of the warrant is not dependent on and does not call for the determination of compliance under Article 98.

Regarding the question about whether Article 98 prevents State Parties from arresting and surrendering Al Bashir to the ICC, I have made my position clear in the previous subchapter. A

⁴⁸¹ See Article 97 of the Rome Statute.

summary of this position. It depends on whether the referral has left Al Bashir's immunity intact. Nothing in the referral suggest that. Instead implied in the referral is the view that immunity for any Sudanese national implicated in the Darfur atrocities does not exist.

My conclusion is that Al Bashir's arrest and surrender to the ICC remain a challenge, yet his trial depends on his presence before the ICC. Taking custody of him poses a number of practical challenges, but there is no legal hindrance preventing ICC state parties and other states having jurisdiction from cooperating with the ICC. Likewise, Al Bashir would breach no law if he voluntarily surrendered to the ICC, as the Dafurian rebel Bahr Garda exemplified in 2008, (although it is unlikely that he will). Lastly, it should be noted that the statute applies as much to the court as a judicial structure as it does to the State Parties as the enforcement pillar. Without enforcement, the function of the judicial branch becomes severely limited, if not paralyzed.

CHAPTER 5: GENERAL RECOMMENDATIONS AND CONCLUSION

5.1 A Way Forward and Conclusion

The research recognizes that there have been many gains made since World War II in the protection of human rights on the international level, but is cautious of the failure to deal successfully with recurring obstacles such as immunities of states officials, which could make many of the gains made on paper less pragmatic. Even worse, those who have suffered gross violations of human rights may be left with the sense that the wrongs they have suffered will never be redressed and that the perpetrators will never be brought to justice. Yet consistently the international claims to reject impunity in absolute terms.

As established in Chapter 1, and 2, criminal repression is the last combat-ground for the struggle against impunity for gross human rights violations and crimes of international law inclusive of genocide, torture, war crimes and crimes against humanity. Oppressive regimes and states that practice abuse as of policy are not prepared to adjudicate the shortcomings of their own regimes. In this regard, therefore, upholding the notion of jurisdictional immunity, in the hope that domestic legal apparatuses will prosecute their own leaders accused of grave crimes is nothing more than an empty hope. A clear exception has to be drawn with respect to *jus cogens* norms that whenever there is any competing obligation between human rights crimes and immunity, the balance of the scale must tilt towards to protection of human rights and securing accountability for such violations in a speedy and fair manner. Numerous scholarships reviewed and discussed in this work show that although international law developed along side statehood, its original premise was on human values, ideally to secure the greater wellbeing of the human family. Thus as ‘the individual’ regains this importance, international law must accept that the individual is an indispensable facet of statehood without which a state cannot exist.

I do suggest therefore, that the solutions to inter-state chaos lies not with absolute procedural immunity but rather in utilizing existing normative framework in a manner that leaves major human rights violators no place to hide. Thus, the current linkage the ILC is drawing between stability of inter-state relations and official immunities may be too remote to justify the insistence on the immunity at the expense of victims of abuse. This view should thus be reconsidered in the draft U.N Convention on Immunity of State Officials from Foreign Criminal Jurisdiction under preparation by the ILC. And as observed in Chapter 3 and 4, the ICJ viewpoint on the current state of the law on *immunity* does breeds *impunity*. Thus a position that is truly reflective of the current international legal thinking is desired. As of the ICC, the potentials within are promising but scholars and practitioners must help build stronger *opinion juris* along side an equally strong state practice. A weak state practice and strong *opinion juris* as already demonstrated in the DRC Congo v. Belgium risk yielding unfavourable decisions.

Finally as resolved in Chapter IV, all measures at disposal must be employed to ensure that Sudan honours its obligation under Article 25 and 103 of the UN Charter triggered by Security Council Resolution 1593 of 2005 that referred that situation in Darfur to the ICC; to arrest and surrender all indictees arising from the Darfur situation. The Security Council should take lead in this, by adopting a fresh resolution addressing the question of Al Bashir's immunity and requiring cooperation from all UN member states; and further to clarify the legal nature and status of UN Security Council referrals within the ICC framework. In addition the Security Council must in the future accept to abide by Article 115 (b) to finance its referrals. Absent of which, the ICC should in the future decline to take any referrals from the UN Security Council since funding such referrals are left to the ICC and not the UN. This would save ICC from future embarrassment and politically motivated Security Council measures.

BIBLIOGRAPHY

Abass, Ademola. 2005. The competence of the Security Council to Terminate the Jurisdiction of the International Court, 40 *Texas International Law Journal* 263.

Abbott, George W. International Relations Theory, international Law, and the Regimes Governing Atrocities in Internal Conflicts, 93 *American Journal of International Law* 361, 1999.

Abi-Saab, Georges. 1999. Fragmentation or Unification: Some Concluding Remarks, 31 *NYU Journal of International Law & Politics* 919.

Aceves, William J. 2000. Liberalisms and International Legal Scholarship: The Pinochet Case And The Move Towards A Universal System Of Transitional Law Litigation, 41 *Harvard International Law Journal* 129.

Ago, Roberto. 1957. Positivism Law and International Law, 51 *American Journal of International Law* 691.

Ago, Roberto 2003. The Jurisdiction of the International Criminal Court over Nationals of non-Parties: Legal Basis and Limits, 1 *Journal of International Criminal Justice* 618.

Akande, Dapo. 2004. International law immunities and the international criminal court. *The American Journal of International Law* 98, (3) (Jul.): 407-33.

Akande, Dapo. 2009. The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities *Journal of International Criminal Justice* 7, (2): 333-35.2

Akande Dapo. 2003. The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits *Journal of International Criminal Justice* 1, (3): 618-650

Anghie, Antony. 2005. Imperialism and Sovereignty and the Making of International Law. Cambridge University Press.

Arendt, Hannah. 1958. *The Human Condition*. University of Chicago Press.

Arendt, Hannah. 1973. *The Origins of Totalitarianism* .Harcourt Brace Jovanovich.

Arendt, Hannah. 2003. *Responsibility and Judgment*. Schocken Books.

Balint, Jennifer. 1996. The Place of Law in Addressing Internal Regime Conflicts, 59 *Law and Contemporary Problems* 103.

Bantekas, Ilias. 2005. The Iraqi Special Tribunal for Crimes Against Humanity, 54 *International and Comparative Law Quarterly* 237.

- Bassiouni, Cherif. 1986. *International Criminal Law & I (Crimes)*. Transitional Publishers.
- Bassiouni, Cherif. 1992. Crimes Against Humanity in International Law.
- Bassiouni, Cherif. 1996. Searching for Peace and Achieving Justice: the Need for Accountability, 59 *Law and Contemporary Problems* 63.
- Bassiouni, Cherif. & Wise Edward., M. 1955. Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute In International Law. Martinus Nijhoff.
- Bianchi, Andrea. 1998. Immunity vs. Human Rights: The Pinochet Case, 10 *European Journal of International Law* 237.
- Becker, Elizabeth. 2002. European Urges Aspirants to rebuff U.S on World Court, *New York Times* Aug 14.
- Bourgon, Michael. 2002. Jurisdiction *ratione temporis*, in The Statute of the International Criminal Court: a commentary, Antonio Cassese et al eds.
- Bourgon, Stephane. 2002. Jurisdiction *ratione Loci*, in The Rome Statute of the International Criminal Court: a commentary, Antonio Cassese et al eds.
- Broomhall, Bruce. 2003. International Justice and the International Criminal Court; Between Sovereignty and the Rule of Law. Oxford University Press.
- Badr, Gamal Moursi. 1984. State immunity : An analytical and prognostic view. Developments in international law. 5. The Hague ; Boston; Hingham, MA: M. Nijhoff; Distributors for the U.S. and Canada, Kluwer Boston.
- . 1984. State immunity : An analytical and prognostic view. Developments in international law. 5. The Hague ; Boston; Hingham, MA: M. Nijhoff; Distributors for the U.S. and Canada, Kluwer Boston.
- Bankas, Ernest K. 2005. The state immunity controversy in international law : Private suits against sovereign states in domestic courts. Berlin; New York: Springer.
- Bassiouni, M. Cherif. 2003. Introduction to international criminal law. International and comparative criminal law series; international and comparative criminal law series. Ardsley, N.Y: Transnational Publishers.
- . 2002. Post-conflict justice. International & comparative criminal law series. Ardsley, N.Y: Transnational Publishers.
- . 1999. Crimes against humanity in international criminal law. 2nd rev ed. The Hague; Boston: Kluwer Law International.

———. 1998. *The statute of the international criminal court : A documentary history*. Ardsley, N.Y: Transnational Publishers.

———. 1997. *International criminal law conventions and their penal provisions*. Irvington-on-Hudson, N.Y: Transnational Publishers.

Bassiouni, M. Cherif, DePaul University. International Human Rights Law, Institute, International Association of Penal Law, International Institute of Higher Studies in Criminal, Sciences, and International Law Association. American Branch, eds. 1997. *The international criminal court : Observations and issues before the 1997-98 preparatory committee*. Nouvelles; 13. Toulouse; Chicago: International Human Rights Institute, DePaul University.

Bassiouni, M. Cherif, and United Nations Centre for Human Rights. 1994. *The protection of human rights in the administration of criminal justice : A compendium of united nations norms and standards*. Irvington, NY; Geneva: Transnational Publishers; Centre for Human Rights, United Nations.

Bekou, Olympia, and Robert Cryer, eds. 2004. *The international criminal court. Libraries of essays in international law*. Aldershot, Hants, England; Burlington, VT: Ashgate/Dartmouth.

Bowett, D. W. 1958. *Self-defence in international law*. Manchester, Eng.: Manchester University Press.

Brohmer, Jurgen. 1997. *State immunity and the violation of human rights*. International studies in human rights. v. 47; international studies in human rights. v. 47 UALAW CALL NUMBER COPY MATERIAL LOCATION. The Hague; Boston: Kluwer Academic Publisher.

Brohmer, Jürgen. 1997. *State immunity and the violation of human rights*. International studies in human rights. v. 47; international studies in human rights. v. 47. The Hague; Boston: Kluwer Academic Publisher.

Burgess, Glenn. 1996. *Absolute monarchy and the stuart constitution*. New Haven: Yale University Press.

———. 1993. *The politics of the ancient constitution : An introduction to english political thought, 1603-1642*. University Park, Pa: Pennsylvania State University Press.

Cassese, Antonio. 2008. *The human dimension of international law : Selected papers*. New York: Oxford University Press.

———. 2008. *International criminal law*. 2nd ed. Oxford; New York: Oxford University Press.

———. 2005. *International law*. 2nd ed. Oxford; New York: Oxford University Press.

———. 2002. When may senior state officials be tried for international crimes? some comments on the congo v. belgium case. *European Journal of International Law* 13, (4) (September 1): 853-75.

Cassese, Antonio, Paola Gaeta, and John R. W. D. Jones. 2002. *The rome statute of the international criminal court : A commentary*. Oxford; New York: Oxford University Press.

Chamlongrasdr, Dhisadee. 2007. *Foreign state immunity and arbitration*. London: Cameron May.

Cranston, Maurice William. 1973. *What are human rights?*. London: Bodley Head.

Cryer, Robert. 2007. *An introduction to international criminal law and procedure*. Cambridge; New York: Cambridge University Press.

———. 2005. *Prosecuting international crimes : Selectivity and the international criminal law regime*. Cambridge studies in international and comparative law; cambridge studies in international and comparative law (cambridge, england : 1996. Cambridge; New York: Cambridge University Press.

Damgaard, Ciara. 2008. *Individual criminal responsibility for core international crimes : Selected pertinent issues*. Berlin: Springer.

———. 2008. *Individual criminal responsibility for core international crimes : Selected pertinent issues*. Berlin: Springer.

Dickinson, Andrew, Rae Lindsay LL.M., and James P. Loonam. 2004. *State immunity: Selected materials and commentary*. Oxford; New York: Oxford University Press.

Doria, Jose, Hans-Peter Gasser, M. Cherif Bassiouni, and I. P. Blishchenko. 2009. *The legal regime of the international criminal court : Essays in honour of professor igor blishchenko : In memoriam professor igor pavlovich blishchenko (1930-2000)*. International humanitarian law series,ISSN1389-6776 ; v. 19; international humanitarian law series ; v. 19. Leiden; Boston: Martinus Nijhoff Publishers.

Dworkin, Ronald. 1977. *Taking rights seriously*. Cambridge: Harvard University Press.

Engel, Salo, and Hans Kelsen. 1964. *Law, state, and international legal order; essays in honor of hans kelsen cooperation of rudolf A. Mactall*. Knoxville: University of Tennessee Press.

Fleiner-Gerster, Thomas. 1999. *What are human rights?*. Leichhardt, N.S.W: Federation Press.

Fox, Hazel. 2008. *The law of state immunity*. The oxford international law library; the oxford international law library. 2nd ed. Oxford; New York: Oxford University Press.

———. 2008. *The law of state immunity*. The oxford international law library; the oxford international law library. 2nd ed. Oxford; New York: Oxford University Press.

Frey, Linda, and Marsha Frey. 1999. *The history of diplomatic immunity*. Columbus: Ohio State University Press.

Gaeta, Paola. 2009. Does President Al Bashir Enjoy Immunity from Arrest? *Journal of International Criminal Justice* 7, (2): 315-332

Hamilton, Keith A., and Richard Langhorne. 1995. *The practice of diplomacy: Its evolution, theory and administration*. London; New York: Routledge.

Kelsen, Hans. 1990. *General theory of law and state*. Special ed. Birmingham, Ala: Legal Classics Library.

———. 1960. *What is justice? : Justice, law, and politics in the mirror of science*. Berkeley: University of California Press.

———. 1944. *Peace through law*. The garland library of war and peace. New York: Garland, 1973.

Kelsen, Hans, Robert W. Tucker, and Red_deer_c. 1966. *Principles of international law*. 2d, rev ed. New York: Holt, Rinehart, and Winston.

Kelsen, Hans. 1952. *Principles of International Law*. New York: Rinehart & Company, Inc.

Lauterpacht, Hersch, Sir. 1927. *Private law sources and analogies of international law (with special reference to international arbitration)* by H. Lauterpacht .. Contributions to international law and diplomacy. London; New York etc.: Longmans, Green and co., ltd.

Lutz, Ellen L., and Caitlin Reiger. 2009. *Prosecuting heads of state*. Cambridge; New York: Cambridge University Press.

Malanczuk, Peter, Michael Barton *Modern introduction to Akehurst, and International Law*. 1997. Akehurst's modern introduction to international law [electronic resource]. 7th rev ed. London; New York: Routledge.

Malanczuk, Peter, Michael Barton *Modern introduction to Akehurst, International Law, and M. V. BuromenskiÄ-*. 2000. *Vstup do mizÍhнародnoho prava za EÄ-kherstom*. Kharkiv: Firma "Konsum".

Moore, Ronald Melville, and Hans Kelsen. 1971. *A critical study of kelsen's theory of legal norms*. Moore.

Moskowitz, Moses. 1968. *The Politics and Dynamics of Human Rights*. Dobbs Ferry, NY: Oceana.

Olásolo, Héctor, Adrian Fulford, Ekaterina Trendafilova, and Kai Ambos. 2009. *The criminal responsibility of senior political and military leaders as principals to international crimes*. Studies

in international and comparative criminal law ; v. 4.; studies in international and comparative criminal law ; v. 4. Oxford; Portland, Or: Hart.

Oppenheim, L., and Hersch Lauterpacht Sir. 1955. International law : A treatise. 8th ed. London: Longmans.

Oppenheim, L. and Jennings, R. Y. and Watts, Arthur, 1996. *Oppenheim's international law. Volume 1, Peace.* Longman, London; New York.

Paulsson, Jan, and Hersch Lauterpacht Sir. 2005. Denial of justice in international law. [Hersch lauterpacht memorial lectures]; [hersch lauterpacht memorial lectures]. Cambridge, UK; New York: Cambridge University Press.

Rawling, Bernard Victor Aloysius, and Antonio Cassese. 1993. The tokyo trial and beyond : Reflections of a peacemonger. Cambridge, UK: Polity Press.

Simbeye, Yitiha. 2004. Immunity and international criminal law. Aldershot, Hants, England; Burlington, VT: Ashgate.

———. 2004. Immunity and international criminal law. Aldershot, Hants, England; Burlington, VT: Ashgate.

Stahn, Carsten, and Göran Sluiter. 2009. The emerging practice of the international criminal court. Legal aspects of international organization ; 48; legal aspects of international organization ; 48. Leiden; Boston: Martinus Nijhoff Publishers.

Stuart, Heikelina Verriijn, Marlise Simons, Benjamin B. Ferencz, and Antonio Cassese. 2009. The prosecutor and the judge : Benjamin ferencz and antonio cassese, interviews and writings. Amsterdam: Pallas Publications.

Triffterer, Otto, and Kai Ambos. 2008. Commentary on the rome statute of the international criminal court : Observers' notes, article by article. 2nd ed. Munchen, Germany; Portland, Or: Beck; Hart.

Tunks, Michael A. 2002 Diplomats or defendants? Defining the future of head-of-state immunity. *Duke Law Journal* 52 *Duke Law Journal*. 651

van Alebeek, Rosanne. 2008. The immunity of states and their officials in international criminal law and international human rights law. Oxford monographs in international law; oxford monographs in international law. Oxford; New York: Oxford University Press.

———. 2008. The immunity of states and their officials in international criminal law and international human rights law. Oxford monographs in international law; oxford monographs in international law. Oxford; New York: Oxford University Press.

Werle, Gerhard. 2007. Individual Criminal Responsibility in Article 25 ICC Statute. *Journal of International Criminal Justice* 5 (4): 953-975